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## Article

### Beyond Best Interests\*

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I. The Problem with Best Interests: A Framework; a Justificatory Idiom; and a Problem .....	1192
A. Framework: The Three Dimensions of State Interventions Aimed at Influencing Reproduction .....	1192
B. Justificatory Idiom: Best Interests of the Resulting Child Justifications, Their Attraction and Prominence .....	1196

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1. The Prominence of BIRC: Some Examples .....	1196
2. The Attraction of BIRC Justifications and the Family Privacy Analogy .....	1204
C. The Problem with BIRC .....	1208
D. Attempts at Reformulating BIRC Arguments Are Unavailing .....	1214
II. Reproductive Externalities .....	1217
A. Reproductive Externalities and An Analogy to Best Interests of <i>Existing</i> Children Regulation .....	1217
B. Problems with the Reproductive Externalities Approach .....	1220
1. Attenuation of Externalities and the Harm Principle .....	1220
2. Underinclusivity .....	1223
3. The Problem of Enhancement .....	1226
4. The Problem of Positive Externalities .....	1230
5. Complications of Trading-Off Externalities Against the Value of Newly Created Children .....	1232
6. Internalizing the Externality .....	1238
7. The Specter of the New Eugenics .....	1240
III. Wronging while Overall Benefiting .....	1244
A. The Plausibility of the Noncomparative Approach to Harm .....	1248
B. Proving Too Much and Proving Too Little .....	1249
C. The Intuition Pump, the Analogy to Procreation, and the Rejection of Hypothetical Consent .....	1254
D. Can This View Support Criminalization or Bodily Integrity Interventions? .....	1260
IV. Legal Moralism and Virtue Ethics .....	1264
A. Legal Moralism .....	1265
B. Virtue Ethics .....	1269
CONCLUSION .....	1273

As Justice Douglas wrote in *Skinner v. Oklahoma*, procreation is one of the “basic civil rights of man” and along with marriage it is “fundamental to the very existence and survival of the race” and the state’s interference with it threatens to have “subtle, far-reaching and devastating effects.”<sup>1</sup> And yet the United States and other countries regulate a wide range of reproductive activities such as forbidding anonymous sperm do-

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1. 316 U.S. 535, 541 (1942).

nation; funding abstinence education; criminalizing brother-sister incest; preventing the sale of sperm, eggs, or surrogacy services; and forbidding single individuals from accessing reproductive technologies. In justifying these and countless other regulations of reproduction legislatures, courts, and commentators have relied (at least in part) on an idiom that I call Best Interests of the Resulting Child (BIRC); a focus on the best interests of the child who will (absent state intervention) result from these forms of reproduction.

In this Article, one of two papers in a larger project, my goal is to reveal and delve into the “secret ambition” of best interests<sup>2</sup> discourse in the regulation of reproduction; I aim to show that its “real significance” lies “not in what it says but in what it stops us from saying,” that is, the way it “takes the political charge out of contentious issues and deflects expressive contention away from” this area of law.<sup>3</sup>

My goal is to show that the BIRC idiom is a nonstarter. Instead, it is a way of talking about the regulation of reproduction that avoids confrontation with justificatory idioms that are disturbing, controversial, and illiberal; idioms that may justify eugenics, mandatory enhancement, or other problematic ideas. My goal in this Article is to force that confrontation and to evaluate the plausibility of four substitute justifications.<sup>4</sup> To preface my conclusion, because these substitute justifications are either implausible or unsettling, they make many if not all of these regulations of reproduction unappealing.

More specifically, this Article makes two main claims. First, while the BIRC approach is extremely prevalent as a justification for regulating reproduction, it is empty and misleading. Part I of this Article defends that claim. I first briefly set the stage by introducing a framework for describing the regula-

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2. This is sometimes called child welfare or child-protective, but I will just label it “best interests” going forward.

3. I borrow this term “secret ambition” from Dan Kahan, who has sought to make a similar showing as to the role played by the “deterrence” idiom in criminal law. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416–17 (1999). More precisely, Kahan’s claim is that the “rhetoric of deterrence displaces an alternative expressive idiom that produces incessant illiberal conflict over status” such that “[c]itizens of diverse commitments converge on the deterrence idiom to satisfy social norms against contentious public moralizing; public officials likewise converge on it to minimize opposition to their preferred policy outcomes.” *Id.*

4. In this respect my project parts ways from Kahan’s, whose feeling about the masking quality of the deterrence idiom is more mixed. See *id.* at 477–500.

tion of reproduction. I then demonstrate both the prevalence of the BIRC justifications in the field and the attraction of this idiom from a political theory perspective, and explain why BIRC justifications (and reasonable reformulations thereof) are unworkable. For this last step, I draw on work in bioethics and the philosophy of identity to show why it is problematic to say that children are *harmed* if brought into existence with lives worth living. I also draw on some parallel legal reasoning from the wrongful life tort liability jurisprudence, and show why attempts at reformulating the BIRC approach also fail. This Part largely summarizes work I have done in a companion paper, *Regulating Reproduction: The Problem With Best Interests*, such that readers familiar with that work may want to skip ahead.<sup>5</sup>

The remainder of this Article is devoted to a second claim: if we go beyond best interests, four possible substitute justifications for regulating reproduction exist—Reproductive Externalities, Wronging while Overall Benefitting, Virtue Ethics, and Legal Moralism—all of which face considerable problems in justifying State intervention. Of the four, I ultimately think Reproductive Externalities (the least-discussed of the group in the scholarly literature) is the most promising. When properly understood, however, even this approach can justify only a much narrower swath of regulation of reproduction than currently exists, such that much of the existing law in this area cannot be justified.

More specifically, Part II considers Reproductive Externalities, wherein the regulation of reproduction is justified not by harm to the resulting child (the BIRC justification) but to costs that reproduction imposes on third parties. Besides a worrisome closeness to the eugenics movement of old, such an approach faces challenges relating to the attenuation of harms and how to assess the cost of diffuse harms, underinclusivity, the possibility of making parents internalize the externality as an alternative solution, and implications for duties to enhance, among other obstacles.

Part III considers a more deontological approach which I call Wronging while Overall Benefiting. This approach shifts the criterion for moral wrongfulness from harm to a conception of wrong absent harm, or to a conception of harm where the fact that an individual is overall benefited is insufficient to save

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5. See generally I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011).

the act from being wrongful. I focus on a version of this argument most tied to legal application developed in the wrongful life context by Seana Shiffrin,<sup>6</sup> but other versions of this approach also exist.<sup>7</sup> I offer several critiques of Shiffrin's brilliant work.

Part IV considers two related but distinct justificatory idioms of Legal Moralism—the use of criminal law or other regulatory tools to deter acts that neither harm nor offend but undermine public morality, and Virtue Ethics, the view that concern over the virtue of the parents making these decisions justifies intervention. I suggest that the Legal Moralist approach is only plausible for a subset of reproductive regulation and faces political-theory and constitutional-law hurdles. As to the Virtue Ethics approaches, I show how arguments along these lines critiquing parental attempts at enhancement of their children and sex selection will not serve as a good ground for the types of regulations I have discussed. Finally, I conclude by suggesting what the regulation of reproduction might look like in light of the re-examination I have forced here.

It is hard to exaggerate the importance of this project: if it succeeds, I will have shown that the prevailing justifications offered for the regulation of reproduction, and most of the regulations they seek to justify, are either intellectually bankrupt or carry with them disturbing and problematic implications such that they are better off discarded. While I find the Reproductive Externalities approach the most promising, I show that when properly understood, even this approach can justify only a much narrower swath of regulation of reproduction than currently exists, such that much of the existing law in this area cannot be justified.

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6. See generally Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117 *passim* (1999).

7. See, e.g., Dena S. Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, 27 *HASTINGS CENTER REP.* 7 (1997); Carter Dillard, *Child Welfare and Future Persons*, 43 *GA. L. REV.* 367 (2009); Elizabeth Harman, *Can We Harm and Benefit in Creating?*, 18 *PHIL. PERSP.* 89, 93 (2004); F.M. Kamm, *Baselines and Compensation*, 40 *SAN DIEGO L. REV.* 1367, 1385 (2003); James Woodward, *The Non-Identity Problem*, 96 *ETHICS* 804 (1986).

## I. THE PROBLEM WITH BEST INTERESTS: A FRAMEWORK; A JUSTIFICATORY IDIOM; AND A PROBLEM

In this Part, I begin by briefly setting out a framework for discussing the regulation of reproduction. I then explain how one particular type of justificatory idiom, what I call Best Interests of the Resulting Child (BIRC), is relied upon by courts, legislators, and scholars, in part because it is attractive from a political theoretical perspective. However, I show that the idiom is problematic for reasons akin to those recognized in the wrongful life tort jurisprudence and by the philosopher Derek Parfit's "Non-Identity Problem." I also briefly discuss how tempting reformulations of the BIRC argument are non-starters. All this, which captures work I have done in a companion Article,<sup>8</sup> serves as a prelude to the main contribution of this Article: to show why the BIRC justificatory idiom is vacuous and to plumb what really lies beneath it.

### A. FRAMEWORK: THE THREE DIMENSIONS OF STATE INTERVENTIONS AIMED AT INFLUENCING REPRODUCTION

As in the companion Article, *Regulating Reproduction*, I find it useful to describe State attempts to influence reproduction through a taxonomy with three dimensions, one to which I will return throughout the Article.

The first dimension is the *target reproductive decision* (or simply "target" for short) the State seeks to influence. For our purposes we can crudely distinguish three such targets: whether, when, and with whom individuals reproduce.<sup>9</sup>

Programs that sterilize the severely mentally ill or deny access to reproductive technologies to those over age fifty affect *whether* these individuals will reproduce. Abstinence education aims to delay reproduction by teenagers or other unmarried individuals and thus influences *when* individuals reproduce. Prohibitions on brother-sister incest, programs aimed at carrier screening for Tay-Sachs or other heritable genetic disorders, and statutes barring sperm donor anonymity attempt to influence *with whom* individuals reproduce.

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8. See generally Cohen, *supra* note 5, at 423 (2011).

9. For other purposes the "how" dimension—for example, whether to permit cloning as a form of reproduction—may also matter, but not for the examples I discuss.

The second dimension goes to *the means by which the State seeks to influence* the target decisions (“means” for short). These interventions can roughly be ordered from strongest to weakest in terms of their level of intrusion. *Physical alteration is the most intrusive*, for example, sterilization of the severely mentally retarded. *Criminal prohibition* is also extremely intrusive, for example, making it a crime to engage in brother-sister incest or to purchase surrogacy services. Less intrusively, the State may make *certain status determinations immutable* (particularly as to parentage) and/or make *contracts surrounding reproduction unenforceable*; for example, California treats gestational surrogacy contracts (where the surrogate carries the fetus to term but does not contribute the egg for fertilization) as enforceable, but not traditional surrogacy contracts (where the surrogate is both the genetic mother and carries the fetus to term).<sup>10</sup> More weakly, the State may also create *default status determinations and set the altering rules*, for example, the older version of the Uniform Parentage Act still in place in many jurisdictions absolves a sperm donor of parental responsibilities only if the recipient was married and the procedure was done through a licensed physician, thereby setting conditions to overcome a default parentage rule.<sup>11</sup> Still less intrusively, the State may *selectively fund* certain types of reproductive assistance—in the United States a number of states use state-level insurance mandates to force insurers to cover in vitro fertilization (IVF; an extremely expensive procedure), but use them selectively to fund only particular types of reproduction through language limiting it to married individuals, thus excluding single individuals and gays and lesbians.<sup>12</sup> An even less intrusive intervention is *informational*, for example, the State’s funding of abstinence education or public health campaigns encouraging carrier testing for Tay-Sachs and other heritable genetic disorders.

The third dimension goes to the justification or, more often, justifications that are, or could be, offered in favor of these interventions (“justification” for short). At a high and somewhat crude level, it is useful to distinguish four different families of

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10. See, e.g., Johnson v. Calvert, 851 P.2d 776, 783–84 (Cal. 1993); *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900–01 (Ct. App. 1994).

11. UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 377, 408 (1973).

12. See, e.g., I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should it Matter?*, 95 MINN. L. REV. 485, 502 n.83, 536–40 (2010).

justifications: (1) the Harm Principle, tracing back to Mill, suggesting that prevention of harm to others is a justification for state action;<sup>13</sup> (2) Paternalism, the argument that the prevention of harm to the actor herself—usually calling on some conception of false consciousness or bounded rationality—is a justification for State action; (3) Wronging Without Harming, the argument that preventing the wronging (usually in a deontological sense) of another, even if one does not harm him, is a justification for state action; finally, (4) Moralism and Virtue, suggesting that though a particular action causes neither harm to the actor nor to third-parties, its negative effects on public morality generally or the virtue/character of individual actors is a justification for state action.<sup>14</sup>

For our purposes, it is useful to further subdivide the Harm Principle form of justification to distinguish between claims of harm to the children resulting from reproductive decisions (the BIRC justification) and claims of harm to other third-parties (a reproductive externalities justification I discuss toward the end of this Article).

The three dimensions and their elements are summarized in Table 1 and can be used to describe many regulations of reproduction.

For example, abstinence education is aimed at influencing *when* individuals reproduce (target), does so through information provision (means), and is typically justified based on a Harm Principle rationale targeting the interests of the children who will result from teenage pregnancy as well as legal moralism aimed at discouraging premarital sex (justification), though other forms of justification are also possible. Prohibitions on sperm donor anonymity influence *with whom* individuals reproduce (target), through criminal prohibition (means), and are typically justified through a Harm Principle rationale targeting the interests of the children who will result (justification).

As is often the case in the fractal world of legal analysis, things can get much more complex, but for present purposes these three dimensions are a useful starting point, and I will

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13. JOHN STUART MILL, ON LIBERTY 13 (Elizabeth Rapaport ed., 1978) (1859) (“That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”).

14. Cf. JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 26–27 (1984) (developing a much fuller taxonomy of justifications for criminal law interventions).

only add additional layers of complexity as needed.<sup>15</sup> While I have designed this taxonomy for this project and its aims, I also think the taxonomy is very useful on its own.

**Table 1:**  
**Three Dimensions of Regulation Reproduction**

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| <ol style="list-style-type: none"><li>1. Target Reproduction Decision<ol style="list-style-type: none"><li>a. When One Reproduces</li><li>b. Whether One Reproduces</li><li>c. With Whom One Reproduces</li></ol></li><li>2. Means By Which the State Influences Reproduction (ordered from most to least intrusive)<ol style="list-style-type: none"><li>a. Physical Alteration</li><li>b. Criminal Prohibition</li><li>c. Immutable Status Determination</li><li>d. Unenforceability of Contract</li><li>e. Default Status Determination</li><li>f. Selective Funding</li><li>g. Information Provision</li></ol></li><li>3. Justification Offered for Intervention<ol style="list-style-type: none"><li>a. Harm Principle<ol style="list-style-type: none"><li>i. Harm to Child (Best Interests of Resulting Child)</li><li>ii. Harm to Third Parties (Reproductive Externalities)</li></ol></li><li>b. Paternalism</li><li>c. Moralism and Virtue (Especially Legal Moralism)</li><li>d. Wronging Without Harming</li></ol></li></ol> |
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15. To wit, I briefly discuss distinctions as to the severity of the reproductive interests that are being stymied—for example, a governmental intervention that prevented you from having an eighth genetically related child when you already had seven might be viewed quite differently than an intervention that prevented you from having any genetically related children, and short delays in the timing of reproduction might be thought of as less severe than longer ones. See, e.g., Dan W. Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377, 380 (2005); I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1194 (2008); Daniel Statman, *The Right to Parenthood: An Argument for a Narrow Interpretation*, 10 ETHICAL PERSP. 224, 227–28 (2003). One could also draw an additional prior distinction between State attempts to influence the reproduction of others (the focus of this Article) versus attempts by other individuals (for example, charities offering voluntary sterilization programs for poor women).

## B. JUSTIFICATORY IDIOM: BEST INTERESTS OF THE RESULTING CHILD JUSTIFICATIONS, THEIR ATTRACTION AND PROMINENCE

### 1. The Prominence of BIRC: Some Examples

In a large set of areas, the Best Interests of the Resulting Child (BIRC) idiom has been a prominent (indeed in some cases the predominant) justification used to defend policies that influence when, whether, and with whom we reproduce. In this Section I concentrate on seven examples that I will return to throughout this Article. In a companion paper I have demonstrated this reliance with exhaustive quotations and citations,<sup>16</sup> so here I just briefly set out the categories with only one or two examples of that reliance.

**Criminalizing Brother-Sister and First Cousin-First Cousin Incest Between Adults:** Brother-sister and cousin incest is still illegal in many U.S. states, and a similar ban was recently upheld in England in a case involving siblings who were adopted into separate families as children.<sup>17</sup> “The most commonly cited rationale for prohibiting consensual relations is that incestuous relationships have the potential to create children with genetic problems if the parties reproduce,”<sup>18</sup> a perfect illustration of a BIRC justification. The reason is that in an incestuous coupling there is a higher likelihood that both partners will carry the same recessive gene, thus increasing the likelihood of genetic abnormalities from a two-to-three percent risk rate of severe abnormalities in non-consanguineous relationships to between a thirty-one and forty-four percent risk of severe abnormalities for sibling sexual relationships.<sup>19</sup> Scholars like Naomi Cahn have accepted the BIRC justification for these rules in principle, with some concerns as to over-inclusivity prompting them to argue for more narrowly tailored versions of these rules.<sup>20</sup>

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16. See Cohen, *supra* note 5, at 429–45.

17. See, e.g., LA. REV. STAT. ANN. § 14:78 (2012); MD. CODE ANN., CRIM. LAW § 3-323 (West 2011); NEB. REV. STAT. §§ 28-702, 28-703 (2008); Naomi Cahn, *Accidental Incest: Drawing The Line—Or The Curtain?—For Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 61, 89 (2009).

18. Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1391 (2008).

19. Cahn, *supra* note 17, at 85.

20. E.g., Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1570 (2005); Cahn, *supra* note 17, at 86–87.

**Abstinence Education/Funding:** The U.S. government has spent more than \$1.5 billion to promote abstinence-only education in a series of programs, and among the conditions of receiving that funding is that the program “teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child.”<sup>21</sup> This same BIRC justification is also apparent in support for these programs by conservative commentators.<sup>22</sup>

**Reproductive Technology Access Restrictions by Age, Marital Status, Sexual Orientation:** Countries like Italy, France, the United Kingdom, Greece, Japan and the Australian states of Western Australia, South Australia, and Victoria, have put in place restrictions on access to reproductive technology requiring that users be below a certain age, married, and/or heterosexual.<sup>23</sup> These restrictions are often premised on BIRC-type concerns, for example, the Italian parliament’s concern with “avoiding psycho-social damage to the child,” and the U.K. Act’s requirement that “a woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of the treatment.”<sup>24</sup>

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21. 42 U.S.C. § 710(b)(2) (2006); BONNIE SCOTT JONES & MICHELLE MOVAHED, AM. CONSTITUTION SOCY, LESSON ONE: YOUR GENDER IS YOUR DESTINY—THE CONSTITUTIONALITY OF TEACHING SEX STEREOTYPES IN ABSTINENCE-ONLY PROGRAMS 3–4 (2008), available at <http://www.acslaw.org/files/Jones%20-%20Movahed%20Issue%20Brief.pdf>.

22. See, e.g., Patrick F. Fagan, *How Broken Families Rob Children of Their Chances for Future Prosperity*, HERITAGE FOUND. BACKGROUNDER, June 11, 1999, No. 1283 available at <http://www.heritage.org/Research/Family/BG1283.cfm>.

23. E.g., *Infertility Treatment Act 1995* (Vic) s 8 (Austl.), available at [http://www.austlii.edu.au/au/legis/vic/hist\\_act/ita1995264.pdf](http://www.austlii.edu.au/au/legis/vic/hist_act/ita1995264.pdf); *Human Reproductive Technology Act 1991* (WA) ss 4, 23(c) (Austl.), available at [http://www.austlii.edu.au/au/legis/wa/consol\\_act/hrtat1991331/index.html#s23](http://www.austlii.edu.au/au/legis/wa/consol_act/hrtat1991331/index.html#s23); *Reproductive Technology Act 1988* (SA) ss 10(b), 13(3)(b) (Austl.), available at [www.legislation.sa.gov.au/LZ/C/A/ASSISTED%20REPRODUCTIVE%20TREATMENT%20ACT%201988/2000.07.05\\_\(1996.08.01\)/1988.10.PDF](http://www.legislation.sa.gov.au/LZ/C/A/ASSISTED%20REPRODUCTIVE%20TREATMENT%20ACT%201988/2000.07.05_(1996.08.01)/1988.10.PDF); Nomos (2002: 3089) [Medically Assisted Human Reproduction], Official Gazette of the Hellenic Republic 2002, 1:1455 (Greece), available at [www.bioethics.gr/media/pdf/biolaw/human/law\\_3089\\_en.pdf](http://www.bioethics.gr/media/pdf/biolaw/human/law_3089_en.pdf); DEPT OF HEALTH, REVIEW OF THE HUMAN FERTILISATION AND EMBRYOLOGY ACT, 2006, Cm. 6989, at 9 (U.K.) available at [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/en/documents/digitalasset/dh\\_073065.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/en/documents/digitalasset/dh_073065.pdf); Rachel Anne Fenton, *Catholic Doctrine Versus Women’s Rights: The New Italian Law On Assisted Reproduction*, 14 MED. L. REV. 73, 84–89 (2006); Rachel Brehm King, *Redefining Motherhood: Discrimination in Legal Parenthood in Japan*, 18 PAC. RIM L. & POL’Y J. 189, 214–15 (2009).

24. DEPT OF HEALTH, *supra* note 23; Fenton, *supra* note 23, at 88. The

While no U.S. state currently bans Assisted Reproductive Technology (ART) use by aged, single or lesbian, gay, bisexual, or transsexual (LGBT) individuals, state legislatures have recently introduced bills to do so.<sup>25</sup> U.S. access restrictions instead primarily take the form of physician self-regulation, with groups like the American Society for Reproductive Medicine—whose 1997 policy statement suggests that “postmenopausal pregnancy should be discouraged,” and treating physicians should carefully consider not only threats to the woman’s health or that of the child, but also “the provision for child rearing . . . [b]ecause parenting is both an emotionally stressful and physically demanding experience, older women and their partners may be unable to meet the needs of a growing child and maintain a long parental relationship,” and because “children could resent having mothers old enough to be grandmothers and be adversely affected psychologically and socially.”<sup>26</sup> The American College of Pediatricians’ has a similar position statement from 2004 on LGBT access to reproductive technology.<sup>27</sup>

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HFE Act of 2008 recently liberalized that policy by omitting the words “including the need of that child for a father” after legislators decided that the requirement discriminated against single mothers and lesbians, however the “duty . . . to consider the welfare of the child who may be born as a result of treatment . . . or any other child who may be affected,” has been retained. Rachael Dobson, *UK Parliament Rejects the Need for a Father in IVF Treatment*, PROGRESS EDUC. TRUST, June 3, 2008, available at <http://www.ivf.net/ivf/uk-parliament-rejects-the-need-for-a-father-in-ivf-treatment-o3427.html>.

25. At the present moment these bills do not seem to be moving forward. See, e.g., Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 44–46 (2008) (citing H.B. 187, 2006 Gen. Assemb., Reg. Sess. (Va. 2006)); Mary Beth Schneider, *Assisted-Reproduction Bill Dropped*, INDIANAPOLIS STAR, Oct. 6, 2005, at B2. U.S. states achieve similar ends through more subtle means such as limiting the enforceability of surrogacy agreements to cases where the commissioning couple is legally married, limiting insurance mandates covering IVF to cases of married heterosexual individuals, and absolving sperm donors of legal parenthood responsibilities only when the recipient is married. E.g., FLA. STAT. ANN. § 742.15(1) (West 2010); TEX. FAM. CODE ANN. § 160.754(b) (West 2008); JESSICA ARONS, CTR. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 8 (2007), available at [www.americanprogress.org/issues/2007/12/pdf/arons\\_art.pdf](http://www.americanprogress.org/issues/2007/12/pdf/arons_art.pdf); Cohen & Chen, *supra* note 12, at 539; Daar, *supra*, at 46; John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 356 (2004).

26. Am. Soc'y for Reprod. Med., *Oocyte Donation to Postmenopausal Women*, 67 FERTILITY & STERILITY 2S–3S (1997).

27. Michelle Cretella & Den Trumbull, *Homosexual Parenting: Is It Time For Change?*, AM. C. PEDIATRICIANS, <http://www.acpeds.org/homosexual-parenting-is-it-time-for-change.html> (last updated Jan. 2012).

Scholars arguing on both sides of the issue have also settled on BIRC as the proper idiom in which to debate these restrictions. For example, Radhika Rao suggests that “[t]he government could limit the use of ARTs in order to prevent physical, psychological, or social harms to the participants *or the resulting children*” as it does in adoption,<sup>28</sup> and admits that deficits to a child in being raised in a single or LGBT household could constitute such harm (although she doubts this claim’s empirical bona fides).<sup>29</sup> On the other side, Lynn Wardle claims that unmarried and LGBT individuals’ use of reproductive technologies harms children by “depriving a child of contact with one of his or her parents.”<sup>30</sup>

**Parental Fitness Screening:** Other scholars have proposed requiring parental fitness screening for reproductive technology, akin to that which occurs in child adoption, premised on BIRC concerns. For example, Debora Spar, now Dean of Columbia University’s Barnard College, notes that the best interests rationale controlling adoption “could easily be extended into the realm of assisted reproduction, even if only to scrutinize procedures that are known to carry extensive risks to the child . . . .”<sup>31</sup> Similarly, Marsha Garrison has argued that “[l]ogically, if regulation of adoption is constitutionally permissible to safeguard the interests of the adoptive child, her biological parents, and would-be adoptive parents, so is regulation of reproductive technology aimed at protecting the various actors involved and any children that might be produced.”<sup>32</sup> She endorses reproductive technology regulation justified by “child-

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28. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1479 (2008).

29. *Id.* at 1476–77; see also NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 168 (2009) (summarizing the conservative argument that the law should “encourage two parents, one of each sex, for every child”).

30. Lynn D. Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 444–51 (2006); see also Camille S. Williams, *Planned Parent-Deprivation: Not in the Best Interests of the Child*, 4 WHITTIER J. CHILD & FAM. ADVOC. 375, 376 (2005) (“[Given the importance of shared familial history and kinship to individual identity, and the importance of both maternal and paternal involvement in the development of children, intentionally depriving a child of one parent will surely wound the child in a multitude of ways.”).

31. Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481, 491 (2009).

32. Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1627 (2008).

protection aims.”<sup>33</sup> These recommendations have some uptake in regulations in the Netherlands and the Australian state of Victoria requiring criminal background checks as a precondition for IVF usage and screening out those who exhibit psychopathologies.<sup>34</sup> In the United States, the American Society for Reproductive Medicine recommends screening out those with uncontrolled psychiatric illness, a history of child or spousal abuse, or drug abuse,<sup>35</sup> and survey data of ART clinics in the U.S. suggests that these screening recommendations have often been adopted.<sup>36</sup>

**Anonymous Sperm Donation:** Austria, Germany, Switzerland, the Australian states of Victoria and Western Australia, the Netherlands, Norway, the United Kingdom, and Switzerland have all banned anonymous sperm donation, in many cases relying on concerns about the welfare of children born without access to their father’s identity—that is, a BIRC reason.<sup>37</sup> Scholars considering the question like Mary Lyndon

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33. *Id.* at 1642; see also Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 854–59 (2000).

34. See J.A.M. Hunfeld et al., *Protect the Child from Being Born: Arguments Against IVF from Heads of the 13 Licensed Dutch Fertility Centres, Ethical and Legal Perspectives*, 22 J. REPROD. & INFANT PSYCHOL. 279, 280–88 (2004) (examining arguments in the Netherlands for withholding IVF treatment from special patient groups); Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDozo L. REV. 2283, 2291 (2007) (discussing IVF laws in the Netherlands); *Mixed Response to Victoria’s Law Change*, ABC NEWS (Dec. 5, 2008, 5:44 PM), <http://www.abc.net.au/news/2008-12-05/mixed-response-to-victorias-ivf-law-changes/230976> (reporting on Victoria’s background-check requirement); see also Daar, *supra* note 25, at 67 (“Basing a physician’s ability to deny ART services on his or her prediction about the child-rearing abilities of a prospective parent is speculative and leaves too much opportunity for masking pure discrimination with concern for offspring.”); Ethics Comm. of the Am. Soc’y for Reprod. Med., *Child-Rearing Ability and the Provision of Fertility Services*, 82 FERTILITY & STERILITY 564, 565 (2004) (arguing that fertility programs should be permitted to deny fertility services when there is a “substantial basis for such judgments”); Judy E. Stern et al., *Access to Services at Assisted Reproductive Technology Clinics: A Survey of Policies and Practices*, 184 AM. J. OBSTETRICS & GYNECOLOGY 591, 596 (2001) (discussing the policy of some clinics to deny access to patients they think would make problematic parents).

35. Ethics Comm. of the Am. Soc’y for Reprod. Med., *supra* note 34, at 567.

36. See Andrea D. Gurkman et al., *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61, 61–65 (2005).

37. See Human Assisted Reproductive Technology Act of 2004 § 4(a), (e) (N.Z.); Ken Daniels & Alison Douglass, *Access to Genetic Information by Donor Offspring and Donors: Medicine, Policy and Law in New Zealand*, 27 MED. &

Shanley, Ellen Waldman, and Naomi Cahn have similarly focused on a BIRC analysis of donor anonymity.<sup>38</sup>

**Sperm/Egg Donor and Surrogate Compensation:** Britain, Canada and the Australian states of Victoria and New South Wales have banned or limited compensation for egg and sperm donation beyond expenses incurred.<sup>39</sup> Canada, the Australian states of Victoria and Western Australia have made commercial surrogacy a crime, as have the U.S. states of New York, Michigan, Washington, and the District of Columbia.<sup>40</sup> Great Britain de facto prohibits commercial surrogacy by forbidding the transfer of parentage rights from the surrogate to the intended parents absent “a showing before the court that the surrogate received no financial or other beneficial consider-

L. 131, 134 (2008); Christopher De Jonge & Christopher L. R. Barratt, *Gamete Donation: A Question of Anonymity*, 85 FERTILITY & STERILITY 500, 500 (2006); Michelle Dennison, *Revealing Your Sources: The Case For Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 8–10 (2008); Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPROD. 818, 818–20 (2001); Ilke Turkmenag et al., *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents*, 22 INT'L J.L. POL'Y & FAM. 283, 283–84 (2008); *Can You Be Anonymous as a Sperm, Egg or Embryo Donor?*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/1973.html> (last visited Jan. 22, 2012).

38. See, e.g., Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 682–88 (2008); Cahn, *supra* note 17, at 73–74; Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 268 (2002); Ellen Waldman, *What Do We Tell the Children*, 35 CAP. U. L. REV. 517, 520–32, 533–55 (2006). Of course, the term “donation” is a bit of a misnomer since in almost all instances the individuals are paid. Still, I use “donation” because it is the more common term.

39. See *Prohibition of Human Cloning Act 2002* (Cth) s 23 (Austl.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 7(1) (Can.); HUMAN FERTILISATION & EMBRYOLOGY AUTH., SPERM, EGG AND EMBRYO DONATION (SEED) REPORT 14 (2005) (UK), available at <http://www.hfea.gov.uk/docs/SEEDReport05.pdf>; Michelle Bercovici, *Biotechnology Beyond the Embryo: Science, Ethics, and Responsible Regulation of Egg Donation to Protect Women's Rights*, 29 WOMEN'S RTS. L. REP. 193, 205–06 (2008); Press Release, Human Fertilisation & Embryology Auth., HFEA Confirms UK Position on Payment for Egg Donors (Feb. 25, 2004), available at <http://www.hfea.gov.uk/784.html>.

40. See D.C. CODE §§ 16-401 to -402 (LexisNexis 2001) (punishing both commercial and altruistic surrogacy); MICH. COMP. LAWS ANN. § 722.859 (West 2002); N.Y. DOM. REL. LAW § 123(1) (McKinney 1999); WASH. REV. CODE ANN. §§ 26.26.210–260 (West 2005); *Infertility Treatment Act 1995* (Vic) s 59 (Austl.); *Surrogacy Act 2008* (W. Austl.) pt 2 div 2 ss 8–9 (Austl.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 6(1) (Can.); Alis L. Burpee, Note, *Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy*, 37 GA. J. INT'L & COMP. L. 305, 310–20 (2009).

ation in exchange for her services as a surrogate . . .”<sup>41</sup> The U.S. states of Louisiana, Maryland, Nebraska, New Mexico and Oregon render *commercial surrogacy contracts unenforceable.*<sup>42</sup>

Although much of the literature on prohibiting (or limiting) compensation for egg (and, much less frequently, sperm) donation focuses on concerns relating to what I have elsewhere termed *coercion*—the voluntariness of the decision to participate due to monetary inducement, a form of Legal Paternalism justification under Part I’s taxonomy—and corruption arguments focused on commodification,<sup>43</sup> a number of authors such as Martha Ertman, Elizabeth Anderson, and Kenneth Baum, have considered BIRC justifications relating to harm to children from being “purchased.”<sup>44</sup>

**Enforcement of Surrogacy Agreements:** In a similar vein, both courts (most famously in *Baby M*<sup>45</sup> and *Johnson v. Calvert*<sup>46</sup>) and scholars such as Richard Epstein<sup>47</sup> have consid-

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41. Ruby L. Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN’S L.J. 275, 287 (2009); see also HUMAN FERTILISATION & EMBRYOLOGY AUTH., *supra* note 39.

42. See Darra L. Hofman, “Mama’s Baby, Daddy’s Maybe:” A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 456–59 (2009).

43. Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 689–90 (2003). I discuss these corruption arguments below under the rubric of Legal Moralism. See *infra* Part IV.A.

44. Martha M. Ertman, *What’s Wrong With a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 33 (2003); see also, e.g., Elizabeth S. Anderson, *Is Women’s Labor a Commodity*, 19 PHIL. & PUB. AFF. 71, 75–77 (1990); Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 156.

45. *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988) (“Worst of all, however, is the contract’s total disregard of the best interests of the child” in that “[t]here is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother”).

46. 851 P.2d 776, 783 (Cal. 1993) (“[A]s Professor Shultz recognizes, the interests of children, particularly at the outset of their lives, are ‘[un]likely to run contrary to those of adults who choose to bring them into being.’ Thus, ‘[h]onoring the plans and expectations of adults who will be responsible for a child’s welfare is likely to correlate significantly with positive outcomes for parents and children alike.’” (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397); *id.* at 799–800 (Panelli, J., dissenting) (arguing that prior contractual agreements as to surrogacy should be ignored and parentage determined purely by inquiry as to which potential parent would serve the best interests of the children).

47. See, e.g., Richard A. Epstein, *Surrogacy: The Case For Full Contractu-*

ered the potential harm to children from being the subject of an enforceable surrogacy agreement as a potential reason not to enforce those agreements, while statutes in several state mandate an adoption-style parental fitness evaluation of potential surrogates based on best-interests concerns before surrogacy agreements will be enforced.<sup>48</sup> To be sure, the BIRC strand of reasoning does not dominate this discourse, but instead is usually offered alongside paternalistic arguments.<sup>49</sup>

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*al Enforcement*, 81 VA. L. REV. 2305, 2321 (1995); see also Vanessa S. Browne-Barbour, *Bartering For Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 484 (2004) (arguing that pre-conception arrangements “constitute baby selling and should be prohibited” due to concern for the welfare of the resulting children).

48. See, e.g., N.H. REV. STAT. ANN. § 168-B:16 to 18 (LexisNexis 2010); UNIF. PARENTAGE ACT, § 803(b)(2) (2000) (amended 2002) (requiring that for judicial pre-approval of a surrogacy agreement, *inter alia*, “unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of suitability applicable to adoptive parents.” (alteration in original)).

49. Legal Paternalism in the regulation of reproduction is the view that the State can justifiably intervene in an individual’s reproductive decisions in order to protect that same individual. In this instance, the State knows what is better for the individual than the individual does. Typically, such arguments portray the individual as suffering from bounded rationality or false consciousness, and he will actually be ‘harmed’ if allowed to pursue his desired path.

While I have analyzed this form of justification elsewhere in my work on reproduction, see, e.g., Cohen, *supra* note 15, at 1161–96, I largely put it to one side here for a few reasons. First, unlike BIRC itself and most of the justificatory idioms I discuss (Legal Moralism may actually share this feature), its application is largely distinct from concerns about child welfare. Legal Paternalism may justify intervening in reproductive decisions that produce children with very high welfare, and it may leave untouched reproductive behavior that produces children with very low welfare. In other words, unlike the other views I canvas, Legal Paternalism does not present itself as a true BIRC-substitute and is instead often a separate kind of justification. Second, for related reasons, Legal Paternalism seems to me plausible only in a few of the examples of reproductive regulations I have discussed above—abstinence education and surrogacy contracting in particular—but unlike a justification such as Reproductive Externalities it has less general application. Finally, while my views sometimes skew in a libertarian direction, I do not believe that the State is always forbidden as a matter of principle from regulating on Legal Paternalism grounds. Instead, I believe that such regulation demands careful case-by-case analysis of the underlying behavioral law and economics data, and the costs and benefits of regulation. See Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1523–59 (2010); Cohen, *supra* note 15, at 1161–96. Thus, if I have succeeded in this Article on casting doubt on many of the justifications one could offer for regulating reproduction, Legal Paternalism remains unscathed here, but subject to case-by-case scrutiny going forward.

## 2. The Attraction of BIRC Justifications and the Family Privacy Analogy

As the mapping in the prior section suggests, the BIRC form of justification for regulation of reproduction focuses on a Millian Harm Principle and applies it to a particularly vulnerable group—children who result from reproduction. From a political theory perspective, this idiom is a very attractive way to justify state interference with reproductive decision-making because that interference is supposedly justified by preventing harm to society's most vulnerable—children.<sup>50</sup> Harm Principle arguments are typically accepted even by libertarians as a proper justification for liberty-limiting government regulation, including criminal sanctions.<sup>51</sup> Further, with harm to children arguments there are no issues of consent or contributory fault, and as a matter of human psychology, the suffering of children is a particularly potent call for action. Thus, BIRC is an attractive justificatory idiom because it relies on relatively uncontroversial premises that permit an overlapping consensus between otherwise divergent comprehensive moral theories, such as welfarism, libertarianism, etc.<sup>52</sup>

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50. To be precise, in some usages what is called “best interests” actually *exceeds* that which is prohibited by the Harm Principle. Richard Storror has captured a similar point nicely, explaining that “although exposing children to serious harm is of necessity inconsistent with their best interests, what is not best for a child does not necessarily harm the child.” Storror, *supra* note 34, at 2300–01. Are the types of cases I discuss in this Article harm-prevention or benefit-conferral? To ask the question demonstrates the baseline problem we face, a point I return to in discussing enhancement below. Nevertheless, because my goal is to defeat the application of best interests reasoning in this context, I want to be as generous as possible to my interlocutor. Therefore, for present purposes I will grant that all interventions justified on BIRC reasoning that I discuss can benefit from the political theoretical cover of the Harm Principle, even though I think the point is arguable. As a terminological matter it might be more precise to describe the Harm Principle as a commitment to the view that harm to others is the *only* basis for justifying the State’s ability to limit liberty, but in what follows I will write more loosely about going “beyond” the Harm Principle versus sticking to it.

51. See, e.g., MILL, *supra* note 13, at 91.

52. See, e.g., JOHN RAWLS, POLITICAL LIBERALISM 144 (expanded ed. 2005). Of course, even the command “protect children from harm” may not forge a complete overlapping consensus in that it may require subscription to particular concepts of what constitutes “harm,” for example whether being born deaf harms a child or instead enables them to be a participant in deaf culture. See I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347, 349–50 (2008). But the BIRC-approach, if it were valid, would certainly be able to forge much *more* of an overlapping consensus than many of the views I canvass below.

BIRC is also an attractive justificatory idiom because it can draw on a parallel idiom in family law as to the importance of Best Interests of *Existing Children*, one of the central organizing principles of family law. Although it is sometimes called child welfare or harm prevention, I will just use Best Interests from here on out. This idiom has origins in the United States going back to at least the 1830s.<sup>53</sup> For example, in determining child custody in a divorce proceeding, many states suggest that the best interest of the child is to be considered, with thirty-five states listing the welfare of the child as the sole consideration.<sup>54</sup> Many state statutes have a presumption that the legal parent will have visitation rights with the child even when they are the noncustodial parent but that the court may terminate those rights on a showing that the child's welfare would be seriously endangered.<sup>55</sup> In adoption, the state investigates potential adopters, qualifying some and disqualifying others, to ensure that allowing the adoptive parents to become the parents of the child is in the child's best interests.<sup>56</sup> Despite constitutional law protecting parents' right to raise their child in their faith, religiously motivated refusal of needed treatment for the child will be overruled when the activity endangers a child's life, and in some jurisdictions if it endangers the child's health as well.<sup>57</sup>

In these and other family law settings' the central model is the same: "[t]he state appropriately steps in, as *parens patriae* protector of the welfare of these non-autonomous persons, to act in their behalf, choosing for them" when their welfare is threatened by parental action.<sup>58</sup> From a political theory per-

53. See, e.g., DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 653 (2006) (citing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 241 (1985)); Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 347–50 (2008).

54. See James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 907–11 (2003) (collecting statutes).

55. *Id.* at 932–34 nn.253–54 (collecting statutes).

56. See, e.g., ME. REV. STAT. ANN. tit. 18-A, § 9-308(b) (2002); see also Dwyer, *supra* note 54, at 881–904 (surveying existing adoption law by state).

57. See Kei Robert Hirasawa, Note, *Are Parents Acting in the Best Interests of Their Children When They Make Medical Decisions Based on Their Religious Beliefs?*, 44 FAM. CT. REV. 316, 317–24 (2006) (collecting cases and histories); Laura M. Plastine, Comment, "*In God We Trust*": When Parents Refuse Medical Treatment for Their Children Based Upon Their Sincere Religious Beliefs, 3 SETON HALL CONST. L.J. 123, 142 & n.79 (1993).

58. James G. Dwyer, *The Child Protection Pretense: States' Continued Conignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 411 (2008).

spective, the best interests justification is a very powerful one, overruling what would otherwise be a forbidden state intrusion into the private realm of family decision-making.

One way of understanding the prominence of BIRC justifications for the regulation of reproduction, then, is as transposition of reasoning from family law into the law of reproduction. The analogy goes: protecting the best interests of existing children is to the constitutional protections against interference in child rearing and legal parenthood (family autonomy) as protecting the best interests of resulting children is to the constitutional protections against interference in reproductive decisions (reproductive autonomy). Both are constitutionally protected spheres where the state is usually restrained from interfering, but where such interference is nevertheless justified in order to protect child welfare.<sup>59</sup>

To be a little more precise, on the existing child side, Supreme Court decisions like *Meyer v. Nebraska*,<sup>60</sup> *Pierce v. Society of Sisters*,<sup>61</sup> *Prince v. Massachusetts*,<sup>62</sup> and *Wisconsin v. Yoder*<sup>63</sup> all recognize a broad family autonomy principle protecting parents' child-rearing decisions but also the need to subordinate family privacy when there are serious threats to child welfare. They offer though two different strands supporting this principle. The predominant strand ties it to child vulnerability: children are at the mercy of the parents, walled off from the assistance of any other agents of protection and socialization but for State intervention.<sup>64</sup> This strand connects the protection of children to the protection of other vulnerable populations such as mentally incompetent adults, with the State stepping in as *parens patriae*.<sup>65</sup> The second, more subordinate

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59. Cf. Dov Fox, *The Illiberality of 'Liberal Eugenics'*, 20 RATIO 1, 5 (2007) (summarizing the argument that the discretion afforded to parents to shape their existing offspring through praise, blame, and other means ought to extend to genetic manipulation).

60. 262 U.S. 390, 401 (1923).

61. 268 U.S. 510, 534–35 (1925).

62. 321 U.S. 158, 165–66 (1944).

63. 406 U.S. 205, 221–22, 230–34 (1972).

64. See, e.g., Helen M. Alvaré, *Gonzales v. Carhart: Bringing Abortion Law Back Into the Family Law Fold*, 69 MONT. L. REV. 409, 415–16 (2008) (arguing this jurisprudence reflects the Lockean premise that "children are self-evidently vulnerable, particularly relative to adults, and require special solicitude and protection" and that "[p]arents have the first duty and first right to shield their vulnerable children; if they fail, the state may intervene on the children's behalf").

65. Dwyer, *supra* note 58.

strand treats protecting child welfare as instrumentally good in ensuring future citizens capable of participating in a democratic society. We can call these two the vulnerability and social planning strands, respectively.

Once the social planning strand is excavated from the opinions, we can also see the Court's attempt to set some limits: *Meyer* notes that the State would exceed its power if it tried to enact the vision of the Ideal Commonwealth from Plato's *Republic*—where all children are reared collectively, no child knowing which is his or her parent and no parent knowing which is his or her child, and society invests in the children of “good parents,” while “the offspring of the inferior, or of the better when they chance to be deformed” are hidden away—or the practice in ancient Sparta of assembling boys at age seven and entrusting their subsequent education and training to official guardians rather than parents, opining that no “[l]egislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.”<sup>66</sup> *Yoder* distinguishes *Prince* by arguing that unlike that case or prior decisions, this was not a circumstance “in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”<sup>67</sup> The Court notes that “the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”<sup>68</sup>

As to existing children, the vulnerability and social planning strands operate largely in tandem in that the State intervenes to protect children from, for example, an abusive home environment because the child is vulnerable *and* because failure to do so will result in a child who cannot appropriately carry the mantle of citizen. In the realm of regulating reproduc-

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66. *Meyer v. Nebraska*, 262 U.S. 390,401–02 (1923). Although the opinion does not cite *The Republic*, the episode and the quotations can be found in PLATO, THE REPUBLIC bk. 5, at 457–60.

67. 406 U.S. at 230; *see also Troxel v. Granville*, 530 U.S. 57, 68 (2000) (recognizing that while the state can interfere to protect best interests, there is a “presumption that fit parents act in the best interests of their children”); *Prince*, 321 U.S. at 173, 175 (Murphy, J., dissenting) (accepting that “shielding minors from the evil vicissitudes of early life” is important, but finding that the state’s failure to show the “bare possibility that such harms might” occur to the child in this circumstance was insufficient).

68. *Yoder*, 406 U.S. at 233–34 (emphasis added).

tion, however, the two strands pull apart conceptually. I argue in Part II that the Reproductive Externalities approach is grounded in this social planning strand, but that much of the discourse regarding regulating reproduction masks that strand by problematically using the language of best interests.

### C. THE PROBLEM WITH BIRC

As I have said, there is a logical problem with attempts to have best interests reasoning play a limiting role in reproductive autonomy analogous to its role limiting family autonomy. The problem is that in the latter context there is an appeal to the best interest of the *existing* child while in the reproductive context the appeal is actually to best interest of the *resulting* child. Whenever the proposed intervention will itself determine whether a particular child will come into existence, best interest arguments premised on *that child's welfare* are problematic.

This point is at the core of the "Non-Identity Problem" developed by Derek Parfit, a problem that has been the subject of a great deal of philosophical attention since the publication of Parfit's *Reasons and Persons* in 1984.<sup>69</sup> The punch line of the problem is that we cannot be said to harm children by creating them as long as we do not give them a life not worth living.<sup>70</sup> A life not worth living is a life so full of pain and suffering, and so devoid of anything good, that the individual would prefer never to have come into existence. As I have demonstrated in *Regulating Reproduction*, this insight renders problematic any attempt to use BIRC reasons to justify a regulation of reproduction that will alter when, whether, or with whom individuals reproduce—such a regulation cannot be said to be in the best interests of the resulting child because a different child will result.<sup>71</sup>

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69. DEREK PARFIT, *REASONS AND PERSONS* 358–59 (rev. ed. 1987); see, e.g., ALLEN BUCHANAN ET AL., *FROM CHANCE TO CHOICE: GENETICS AND JUSTICE* 224–25 (2000); Dan W. Brock, *The Nonidentity Problem and Genetic Harms—The Case of Wrongful Handicaps*, 9 BIOETHICS 269 (1995). For an in-depth treatment in the context of access to reproductive technologies, see John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7 (2004). For my own discussion of the problem in the context of tort liability for intentionally creating children with disabilities, see generally Cohen, *supra* note 52 (arguing to bar tort liability for creating disabled children when it is done by selection).

70. See BUCHANAN ET AL., *supra* note 69, at 233; JOEL FEINBERG, *HARM TO OTHERS* 98–104 (1984); Shiffrin, *supra* note 6, at 118.

71. Cohen, *supra* note 5, at 457.

The easiest version of the problem to see involves regulation of whether individuals reproduce, for example, the denials of access to reproductive technology to LGBT, aged, or single parents. Imagine that sixty-year-old Ethel wants to have a baby through reproductive technology and assume *arguendo* that this child, Maxwell, will be worse off (physiologically, psychologically, etc.) than would the average child born to a woman in her twenties. We cannot say that a state law preventing Ethel's access to reproductive technology at her age furthers the welfare of Maxwell, because if the State blocks that access Maxwell will never exist and, so long as he has a life worth living, coming into existence does not harm him. Thus, any state intervention influencing whether individuals reproduce (absent lives not worth living)<sup>72</sup> cannot be justified by BIRC reasoning.

A similar problem extends to attempts to influence when and with whom individuals reproduce. Parfit's primary discussion of this problem in *Reasons and Persons* is that of a fourteen-year-old girl who has a child and gives it a bad start in life by not waiting to have a child until she is older. As he notes, "We cannot claim that this girl's decision was worse for her child. What is the objection to her decision? This question arises because, in the different outcomes, different people would be born."<sup>73</sup> Thus, here too the usual (what Parfit calls *person-affecting*) conception of harm assumed by the BIRC argument cannot be the basis for justifying attempts to alter when individuals reproduce—such as state funding of teenage abstinence programs or implanting of Norplant or other temporary forms of birth control in women convicted of multiple counts of drug possession.<sup>74</sup> A similar logic applies to interventions regulating

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72. From here on I stop repeating the proviso "absent lives not worth living" but intend it to be implied throughout.

73. PARFIT, *supra* note 69, at 359.

74. To be clear, in the cases I am discussing in this Article, the delay has to be one as to when sperm and egg meet. Compare that to a different delay: a husband and wife fertilize pre-embryos as part of IVF at Time 1, but choose to implant the pre-embryo either at Time 1 + 1 year, or after cryopreservation at Time 1 + 5 years. In many of my examples, the regulation influencing when and with whom we reproduce will also change other facets of an individual's life—like the date on which he or she is born or who his or her rearing parents are—that might also be thought to alter identity in the relevant sense. While I do not think these additional facts are *necessary* to produce a Non-Identity Problem (i.e., it is *enough* for a different sperm-egg combination to occur), I leave open the question of whether they might nonetheless be *sufficient* to do so in some cases even if the same sperm meets the same egg. If they were sufficient, a still-wider swath of the regulation of reproduction might be subject to the Non-Identity Problem, for example, rules regarding the enforcement of

with whom individuals reproduce, for example, the criminalization of adult brother-sister (or first cousin-first cousin) incest in the United States and many foreign countries.

At this juncture it is worth clarifying that none of this depends on any assumption that children are harmed if they are not brought into existence. Instead, I share with others the view that “no one is harmed in not being created, because there is no one to be harmed if we do not create someone.”<sup>75</sup> Thus, accepting this insight in no way implies a conclusion that parents do wrong by failing to have the largest number of children they can or that they harm a particular child by failing to create the child.<sup>76</sup> All it entails is that no one is harmed by being created if he or she is given a life worth living.<sup>77</sup> I emphasize this point, because it is common source of confusion.

In one respect, the whether case is an easier one for ruling out BIRC justifications than the with whom case, and especially the when case, because in these latter cases the claim depends on the assumption that changing which sperm meets which egg—that is changing which child, genetically speaking, is conceived—is *sufficient* to produce a Non-Identity Problem that rules out BIRC justifications. This is a relatively weak assumption. It does not require subscription to a strong form of genetic essentialism—the view that your genes determine who you are—but is instead entirely compatible with the view that given a certain complement of genes you could become any number of different kinds of people from the point of view of what philosophers sometimes call narrative identity.<sup>78</sup> Genetic identity does not ensure narrative identity—identical twins share the same genes but are different people. Thus, it is also not a claim about identity and lack thereof in all senses of the word. It is the weak claim that if we want to know whether the person that results from the particular sperm and egg combination would be harmed, we cannot say that it would further the

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pre-embryo disposition agreements that may alter when pre-embryos are implanted. *See generally* Cohen, *supra* note 49.

75. F.M. Kamm, *Cloning and Harm to Offspring*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 65, 72 (2000–2001).

76. It is at least possible that this conclusion *may* be entailed by one of the competitor views to BIRC as a justification of regulating reproduction, the non-person-affecting principle approach. Cohen, *supra* note 5, at 481–513.

77. *See supra* note 70 and accompanying text.

78. David Shoemaker, *Personal Identity and Ethics*, THE STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta et al. eds., rev. ed. Mar. 5, 2008), <http://plato.stanford.edu/entries/identity-ethics/>.

welfare of that person if we instead substituted a different sperm and egg combination. Philosophers often refer to this as “numerical identity”; two entities are not the same because there are two of them.<sup>79</sup>

To put it tangibly: my mother was married once, without children, before she had me with her second husband. Imagine we concluded (counterfactually I hope!) that on the day of my conception she had instead conceived with her first husband; the resulting child—call him Gabriel—would have been healthier or in other ways had a better life than I did. All the Non-Identity Problem requires accepting is that if we want to know whether my life harms me (i.e., is Glenn harmed by being alive) it would be wrong to compare Glenn’s life to the life Gabriel would have lived. That comparison might be relevant for some other purposes—indeed the non-person-affecting principle approach I discuss in Part III focuses on it—but is not relevant to the question of whether Glenn has been harmed by being born. I believe Parfit is right on this issue of alterations of *when* or *with whom* we reproduce, and in what follows I will examine the consequences for the law.<sup>80</sup>

I have also purposefully restricted my canvas in this Article to cases where the State seeks to influence who will be conceived, *not* who will be born, to bracket (for present purposes) three additional more controversial questions. The first question concerns whether Non-Identity Problems can result from genetic manipulations of early embryos, and which kinds of manipulations—an issue I have discussed in other work concerning tort liability for parents who use reproductive technol-

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79. Harold Noonan, *Identity*, THE STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta et al. eds., rev. ed. Nov. 7, 2009), available at <http://plato.stanford.edu/archives/win2009/entries/identity/> (“To say that things are identical is to say that they are the same. ‘Identity’ and ‘sameness’ mean the same; their meanings are identical. However, they have more than one meaning. A distinction is customarily drawn between *qualitative* and *numerical* identity or sameness. Things with qualitative identity share properties, so things can be more or less qualitatively identical. Poodles and Great Danes are qualitatively identical because they share the property of being a dog, and such properties as go along with that, but two poodles will (very likely) have greater qualitative identity. Numerical identity requires absolute, or total, qualitative identity, and can only hold between a thing and itself.”).

80. For those who remain unpersuaded, my analysis of regulations on “whether” individuals can reproduce that cover many of the interventions discussed above should still matter, since it does not rely on this tie between genes and identity. See Cohen, *supra* note 5, at 445–71. How the Non-Identity Problem interfaces with religious views of ensoulment I leave to religious scholars and self-consciously do not address here.

ogies to purposefully create children with disabilities; these cases raise the further question of whether genetic manipulations rather than changing conception can give rise to Non-Identity Problems.<sup>81</sup> The second question concerns the interplay between Non-Identity Problems and the abortion right, a case I believe requires a quite different analysis: On the one hand, while no one is harmed if not conceived, on some views of fetal personhood the fetus may be harmed if aborted, creating a divergence from my cases. On the other hand, for some writers that defend the abortion right as a right not to be a gestational parent that is tied to bodily integrity, that right exists irrespective of fetal person such that this divergence may be irrelevant.<sup>82</sup> Thus, my analysis here does not necessarily cut in any direction on the abortion debate, except to render more problematic a small strand of reasoning occasionally presented that parallels BIRC by defending the abortion right on the basis of harm to children of growing up unwanted or out-of-wedlock.<sup>83</sup> The third question relates to regulation of multiple gestation, made (in)famous by the “Octomom” news coverage.<sup>84</sup> There are many complications here—indeed one might conclude that some of the multiple gestating pre-embryos are harmed while others are not<sup>85</sup>—but for this Article I stick to simpler cases,

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81. In a symposium issue in which we participated, Kirsten Smolensky argued that such manipulations never can create Non-Identity Problems, Kirsten Smolensky, *Creating Children With Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 331–36 (2008), while I have argued against that conclusion, Cohen, *supra* note 52, at 350–59.

82. See, e.g., Cohen, *supra* note 15, at 1132; Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971) (grounding a defense of abortion in the thought experiment of waking up one morning to find a world-famous violinist connected to your vital organs without your permission).

83. That strand is one way to read the passage in *Roe v. Wade* noting that “[t]here is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.” 410 U.S. 113, 153 (1973).

84. See, e.g., Camille M. Davidson, *Octomom and Multi-Fetal Pregnancies: Why Federal Legislation Should Require Insurers to Cover In Vitro Fertilization*, 17 WM. & MARY J. WOMEN & L. 135, 137–38 (2010).

85. To hum only the first few bars of a very complex set of questions: first imagine a woman is deciding how many of six pre-embryos to implant at once. If we knew that the prevailing legal rule would cause her to implant all six at once or each of the six seriatim, one might not think there is a Non-Identity Problem since the same six (genetically speaking) children will come into existence, the only question is whether they will suffer the deficits of womb sharing or not. Even this conclusion will depend on the issue alluded to above, *su-*

which as we will see are not nearly as simple as they might appear.

At this juncture some readers might react: "That is philosophically fascinating, but it seems like an interesting puzzle that would never motivate judges or other legal actors." To the contrary, the Non-Identity Problem insight has been implicitly accepted by the vast majority of courts that have rejected wrongful life tort liability for similar reasons. To give but one example, in *Siemieniec v. Lutheran General Hospital*, the Illinois Supreme Court rejected the child's ability to bring a wrongful life suit because it was "reluctant to find that the infant has suffered a legally cognizable injury by being born with a congenital or genetic impairment as opposed to not being born at all" and

[r]ecognition of a cause of action for wrongful life in this case would therefore require this court to find [the child] had an interest in avoiding his own birth, *i.e.*, that there is a fundamental legal right not to be born when birth would necessarily entail a life of hardship<sup>86</sup> which the *Siemieniec* court was not prepared to do.<sup>87</sup>

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*pra* note 74, of whether changes in sperm-egg combination are only sufficient or actually necessary to produce a Non-Identity Problem. Contrast this with a case where the legal rules adopted to regulate multiple gestation will cause the prospective mother to either implant all six pre-embryos at once, or only implant two pre-embryos *seriatim* (due to cost or some other reason). Now there is no Non-Identity Problem as to the two that would have been implanted either way, but there may be a Non-Identity Problem as to the four whose implantation depends on the prevailing legal rule. Actually, on some views about whether fertilized pre-embryos are harmed by not being implanted, the answer here might depend on whether the prevailing legal rule alters how many pre-embryos are *implanted* versus how many are *fertilized* to begin with. Finally, contrast these two cases with still another case where multiple gestation occurs due to the use of a fertility drug, and but-for the use of the fertility drug all the fetuses that come into being would be the result of different sperm-egg combinations. Here it seems as though the Non-Identity Problem affects all of the fetuses and thus supports the claim that the fertility drug should be banned due to harm to these children. This is merely a taste of the complexities involved in reasoning about the Non-Identity Problem in the multiple gestation context, one of the reasons I put it to one side in this Article since it deserves its own separate analysis elsewhere.

86. 512 N.E.2d 691, 697, 698 (Ill. 1987) (citations omitted).

87. *Id.*; *see also, e.g.*, *Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984) ("Thus, the cause of action unavoidably involves the relative benefits of an impaired life as opposed to no life at all. All courts, even the ones recognizing a cause of action for wrongful life, have admitted that this calculation is impossible. . . . [T]his is not just a case in which the damages evade precise measurement. Here, it is impossible to rationally decide whether the plaintiff has been damaged at all.").

The fact that courts, legislatures, and commentators have accepted the implications of the Non-Identity Problem in one area of the law but through BIRC discourse have entirely ignored it elsewhere may be further evidence of the “secret ambition” of best interests discourse—the choice of a palatable but ultimately vacuous way of talking about regulating reproduction that forestalls confrontation with the controversial premises that lie beneath.

#### D. ATTEMPTS AT REFORMULATING BIRC ARGUMENTS ARE UNAVAILING

As I have argued in-depth in *Regulating Reproduction*, three tempting attempts to reformulate the BIRC argument so as to avoid the problem raised by Parfit and recognized by the wrongful life jurisprudence are unavailing.<sup>88</sup>

Because BIRC reasoning is only problematic for cases that produce children with lives not worth living, I first consider whether we might still be able to use BIRC reasoning to justify the state interventions discussed above by arguing that if left unchecked these reproductive activities would indeed create a life not worth living.<sup>89</sup> Unfortunately, with the possible exception of the genetic abnormalities stemming from brother-sister incest (and even there it is dubious), I show that none of the lives created absent these interventions can plausibly result in a life not worth living.<sup>90</sup> These would have to be lives of negative utility, where existing is worse for the individual than not existing.<sup>91</sup> Even if not a null set, I have argued that this set is vanishingly small, perhaps encompassing only truly awful diseases like Tay Sachs and Lesch Nyhan syndrome but not much (if anything) else.<sup>92</sup>

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88. Cohen, *supra* note 5, at 471–513.

89. *Id.* at 472–74.

90. *Id.*

91. *Id.* at 473.

92. Infants with the incurable Lesch-Nyhan syndrome begin (at approximately 6 months of age) a process of neurological and physiological deterioration involving athetosis (involuntary writhing movements), severe mental deficiencies, and a tendency towards compulsive self-mutilation often requiring placing the child’s elbows in splints, wrapping her hands in gauze, and sometimes extracting all her teeth. See, e.g., ROBERT F. WEIR, SELECTIVE NONTREATMENT OF HANDICAPPED NEWBORNS 48–49 (1984). Tay-Sachs has its onset in infancy and leads to “progressive retardation in development, paralysis, dementia (mental disorder), blindness, cherry-red retinal spots, and death by age three or four years.” 5 ATTORNEYS’ TEXTBOOK OF MEDICINE § 17.21(3) (Roscoe N. Gray & Louise J. Gordy eds., 3d ed. 2000).

The second reformulation draws a distinction between what I have labeled *perfect* and *imperfect* Non-Identity Problems and suggests that BIRC reasoning is only problematic for the perfect cases.<sup>93</sup> In perfect cases—including the examples discussed above of criminalizing brother-sister adult incest, abstinence education funding, and access restrictions to reproductive technology—BIRC-reasoning is self-contradictory because the policy, if effective, will necessarily alter when, whether, and with whom one reproduces, thereby creating a Non-Identity Problem. By contrast, in imperfect cases—such as the interventions discussed above aimed at prohibiting sperm donor anonymity, making surrogacy agreements unenforceable, or prohibiting of payment for gamete donation or surrogacy services—it is theoretically possible that the policy can be successful while not altering whether, when or with whom someone reproduces, but in reality is very unlikely to do so, since if any of those alterations take place the Non-Identity Problem will apply. While perfect Non-Identity Problems make BIRC-type justifications for policies nonsensical, imperfect Non-Identity Problems will sharply reduce the number of children for whom the BIRC-type reasoning can be invoked in favor of a given intervention. For example, for sperm donor anonymity, the choice of whether to permit or prohibit donor anonymity is very likely to alter which children come into existence, and while there is chance that the exact same sperm donor provides the exact same sperm to the exact same recipient, and that the fertilization occurs at the exact same time it would have in an anonymity-permitted regime, the probability/number of resulting children for whom this is likely to be true is extremely small. I show that at least as to these examples, concerns about this small probability of harming a small number of children cannot justify these restrictions.<sup>94</sup> It requires accepting burdening the liberty of large swaths of the population to protect an extremely small number of potential children in a way that is in tension with our rejection of a similar approach as to the best interests of *existing* children.<sup>95</sup>

A third reformulation adapts proposals by philosophers (most prominently Parfit himself and Dan Brock) who suggest that the wrongfulness of these reproductive acts stems not from harming the children that result but from the failure to pro-

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93. Cohen, *supra* note 5, at 474–76.

94. *Id.* at 477–81.

95. *Id.* at 476.

duce children who suffered less or had more opportunity, an outcome that is wrong from a non-person-affecting vantage point, at least in certain cases.<sup>96</sup> This is referred to as the “non person-affecting principle” approach.<sup>97</sup> Elsewhere, I have discussed several reasons why this approach will not succeed: it cannot support the full gamut of programs for which BIRC is usually invoked because it appears limited cases where the same-number of children will exist whether or not the intervention is put in place, and we merely substitute the higher for lower welfare person;<sup>98</sup> it is problematically underinclusive as to the categories of reproduction it seeks to regulate;<sup>99</sup> it carries disturbing implications as to enhancement and eugenics;<sup>100</sup> and on a political theoretical level it may not provide a valid basis for criminalizing reproductive conduct or invading bodily integrity.<sup>101</sup>

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BIRC and its reformulations fail. Where do we go from here? We face two possible choices: the first is to accept that these interventions are unjustified. The second is to drop the fig leaf of BIRC, and delve into the secret ambition of best interests arguments pertaining to regulating reproduction, the task of the remainder of this Article. I believe there are four families of potential frameworks that might sustain the regulatory interventions described above—Reproductive Externalities, Wronging While Overall Benefitting, Legal Moralism, and Virtue Ethics—but each of these holds problems I discuss below. In any event, as I hope to make clear, using any of these approaches requires a move away from the comfortable (albeit false) overlapping consensus between comprehensive moral theories that BIRC arguments offer and requires instead adopting more contestable premises. Throughout, I consider how these arguments might justify some modes of intervention (e.g., informational, funding) but not others (e.g., bodily integrity infringements, criminalization).

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96. *Id.* at 481–85.

97. Brock, *supra* note 69, at 273.

98. Cohen, *supra* note 5, at 485–93.

99. *Id.* at 494–96.

100. *Id.* at 496–504.

101. *Id.* at 504–12.

## II. REPRODUCTIVE EXTERNALITIES

### A. REPRODUCTIVE EXTERNALITIES AND AN ANALOGY TO BEST INTERESTS OF *EXISTING CHILDREN* REGULATION

The Non-Identity Problem is an obstacle for any attempt to justify state intervention by claiming that the child who would be produced absent the intervention is harmed. An approach I call Reproductive Externalities suggests we merely need to change our specification of the victim of the harm. Yes, the resulting child cannot be harmed if these interventions are not put in place for the reasons set out by the Non-Identity Problem, but third parties may be harmed by this child's existence.

Indeed, as I suggested above, one might find an analogue to this approach in the Supreme Court cases countenancing interference with family privacy in the name of protecting the best interests of *existing* children: while the child vulnerability strand has become more prominent as the basis for intervention, there is also a strand suggesting it can be justified by third party interests in selecting for citizenship that I call the social planning strand.

To be sure, these cases are not a perfect match for our context; they directly regulate only one way in which parental behavior might jeopardize the interests of third parties: “[W]hen parental behavior might make these children unable to participate politically.” While one or two of the reproductive acts the State has targeted (discussed above) may produce that kind of political participation deficit if left unchecked—increased risks of genetic abnormalities from brother-sister incest is the intervention most likely to do so—most of the targeted reproductive behavior seems unlikely to produce children incapable of the mantle of citizenship.

There is also a disanalogy between the two contexts in the way the parties are configured. In the family privacy cases the parents' interest lies in opposition not only to the State's interest but also to the existing child's interest (in becoming capable of political participation) as well. By contrast, in reproductive regulation cases parental liberty and state interests are potentially in opposition, but (because of the Non-Identity Problem) we cannot say the child will be harmed if the State's interests do not trump. There are other differences—interference in rearing might be thought of as more or less noxious an interference with liberty than interventions of the kind we have been discussing. But at the very least, the analogy suggests we should

take seriously the possibility of justifying interventions based on setbacks to the interests of third parties.

Reproductive externalities might take several forms: One version is intrafamilial, wherein the intervention is urged not to benefit the resulting child but to benefit other children of the potential parent who already exist. For example, a claim that parents over a certain age should not be allowed to reproduce because the resulting child will likely suffer from impairments due to the advanced maternal age and will remove resources from its already-existing siblings. Such a claim allows the State to recapture some of the political theoretical capital of BIRC—it retains a Harm Principle justification focused on a particularly vulnerable population, children, but just focuses on other children.

However, the intra-familial variant faces several drawbacks as an adequate substitute for BIRC. First, it can only justify a much smaller set of regulation of reproduction—it requires that there be other children in the family already existing for it to operate, which in many of the proposed regulations is unlikely to be the case. Second, it is quickly subject to a *reductio ad absurdum* counterargument as to underinclusivity in ways I will discuss below.

Accordingly, I instead focus on a more domain-general form of Reproductive Externalities—the idea that the birth of certain children will lead to cost-type externalities to third-parties within a State, and that these externalities might serve as a justification for the kinds of interventions discussed in Part I.

At first glance, this version appears to capture many of the usages of BIRC-type reasoning that justify the regulations of reproduction we have discussed. Even if we cannot say the resulting child is harmed because of the Non-Identity Problem, the same deficits that are foisted on the child might count as reasons why fellow taxpayers are harmed if they are forced to pay for them. These costs are most tangible as to cases involving the imposition of disabilities (as the term is used colloquially) from genetic abnormalities stemming from brother-sister incest. The public fisc may have to pay for some costs here—for example, the Individuals with Disabilities Education Act (IDEA) requires the federal government to fund state and local agencies to ensure “appropriate” education for the disabled “to

meet their unique needs.”<sup>102</sup> Title II of the Americans with Disabilities Act (ADA) forbids state and local governments from denying to a “qualified individual with a disability” participation in or the benefits of “the services, programs, or activities of a public entity,” for instance, by requiring a state courthouse to have an elevator.<sup>103</sup> Resulting disabilities may also place burdens on private employers, for example, under the accommodations requirements of Title III of the ADA.<sup>104</sup>

Indeed, in some cases a form of the externalities argument is already being offered alongside a BIRC type argument. For example, for programs that receive abstinence education funding under either the Maternal and Child Health Services Block Grants or the CBAE block grants, the programs must teach adolescents “that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society.”<sup>105</sup> In such cases one tangible contribution of my work is to show that the BIRC argument—if it must be recast in this way to be coherent—will add nothing as a justification, since the BIRC justification is already being improperly offered to support those programs *in addition* to the Reproductive Externalities approach.

The bigger contribution, though, is to show that there are several problems with embracing Reproductive Externalities as a substitute for BIRC justifications: (1) the harms involved are quite attenuated; (2) there is significant underinclusivity as to what forms of reproduction are regulated; (3) the approach may justify government-enforced enhancement; (4) the approach does not adequately grapple with the possibility of positive ex-

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102. 20 U.S.C. § 1400(d)(1)(A) (2006); Bd. of Educ. v. Rowley, 458 U.S. 176, 179–84 (1982) (identifying the conditions of the Education of the Handicapped Act); Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 820–21 (8th Cir. 1999) (describing rights under the IDEA).

103. 42 U.S.C. §§ 12131–12132 (2006); *see also* Tennessee v. Lane, 541 U.S. 509, 513–18 (2004) (discussing the ADA’s requirements in this regard and upholding the constitutionality of the ADA against an Eleventh Amendment attack).

104. 42 U.S.C. § 12112(b)(5)(A); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 477–79 (1999) (describing ADA applicability to private airlines); *cf.* Eric Rakowski, *Who Should Pay for Bad Genes*, 90 CALIF. L. REV. 1345, 1382 (2002) (“Defenders of the person-affecting restriction note that many people, including potential parents, siblings, insurers, insurance purchasers, and public officials and the taxpayers they represent, will be worse off if a child is born disabled when a different child might have been born without the disability. Ordinarily, their interests alone will justify spending on preconception or intrauterine screening programs.”).

105. 42 U.S.C. § 710(b)(2); JONES & MOVAHED, *supra* note 21, at 4.

ternalities; (5) the approach faces complications as to valuing new lives that may limit its applicability to same number substitutions; (6) on the logic of this approach it may be better to force parents to internalize reproductive externalities rather than to prevent or discourage reproduction, and (7) the approach may depend on eugenic premises we find objectionable. I set out these problems one-by-one in the rest of this Part. Nevertheless, as I explain below, once we have seen the available alternatives I will argue that this justification for regulating reproduction—the one given the least attention in the scholarly literature—is the best of a not very good lot. While the Reproductive Externality approach seems like the best way forward to justify regulating reproduction, given its problems and limitations it can justify only a much more narrow swath of regulation than that which currently exists.

## B. PROBLEMS WITH THE REPRODUCTIVE EXTERNALITIES APPROACH

### 1. Attenuation of Externalities and the Harm Principle

While, as discussed, genetic abnormalities that may result from brother-sister adult incestuous reproductive sex and possibly advanced maternal age can give rise to externalized costs of a predictable and measurable sort,<sup>106</sup> the other interventions discussed in Part I produce much more attenuated and speculative externalities. In some cases, for example, sperm donor anonymity and the prohibition on commercialized surrogacy or the enforcement of surrogacy agreements, the link between the deficits experienced by children and the cost externalities seems strained. Consider regulation to prevent access to reproductive technologies for single or LGBT parents. Most of the (extremely contested) studies suggesting some impairment

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106. According to one facility, the risk of Down syndrome increases from 1 in 952 to 1 in 30 as maternal age increases from 30 to 45 years of age if the patient is using her own eggs, but reduces to the 30 year old risk level if the egg provider is 30 years old. *Advanced Maternal Age*, CAL. IVF, <http://www.californiaivf.com/AMA.htm> (last visited Apr. 18, 2012). Thus, older women who reproduce with younger women's eggs do not pose increased risk. *Id.* If advanced maternal age is also paired with advanced paternal age or there is no supporting father, there is also the possibility of externalized costs in the case of death before the child reaches the age of majority, in which case the child may become a ward of the state, but that is likely in only a very small fraction of cases. Moreover, there will be significant underinclusivity problems in that many parents with shorter than average life expectancies reproduce in ways the law does not seek to prevent.

from being raised in a single parent family focus on things like cognitive development, likelihood to complete high school, alcohol and drug use, and gender role assumption.<sup>107</sup> Even if these things had a likely negative impact on the child's welfare (the problematic BIRC argument), their impact on *social* welfare, especially from the point of view of cost externalities, is less clear; the impact of the potential harm to the child seems to lose force as it diffuses through all of the facets of social life, until it feels more like a whimper when we get to the question of cost externalities.

All things being equal, is it bad if, for example, children have worse rather than better cognitive development, and does that really impose costs on society? In one very attenuated sense it does—perhaps there is a higher probability that children who end up with lower IQs will eventually contribute less to the tax base, require more resources in public schools, or be more prone to incarceration. But, if the Harm Principle is to have any bite as a serious liberal limit on interventions that restrict liberty, such small and speculative externalities seem problematic when used as justifications.<sup>108</sup> As Feinberg has noted in the criminal context, whether a Harm Principle argument is persuasive as a basis for limiting liberty depends in part on the gravity of the harm that will result, its probability, the value of the conduct that is being prohibited, and the importance of the underlying interest which will be thwarted by the intervention.<sup>109</sup> Here it would seem many of these considerations cut

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107. See, e.g., Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligation*, 52 UCLA L. REV. 815, 861–65 (2005) (collecting studies); Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 198–203 (1996) (collecting studies).

108. Cf. Epstein, *supra* note 47, at 2325 (observing, in regard to “soft externalities” (such as corruption of society’s view of women’s sexuality) from contractualized commercial surrogacy that “John Stuart Mill’s classic statement that the sole justification for restricting individual liberty is the prevention of harm to others is wholly gutted if the conception of harm is given a meaning as broad as that supposed in this context”).

109. FEINBERG, *supra* note 14, at 187–217; see also Robertson, *supra* note 69, at 18 (“[M]any of the conditions of concern involve questions of relative well-being, and may not themselves impose such significant costs on others as to justify limitation of a person’s reproductive plans in order to avoid them.”). *But see* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 183 (1999) (“Once non-trivial harm arguments have been made, we inevitably must look beyond the harm principle. We must look beyond the traditional structure of the debate over the legal enforcement of morality. We must access larger debates in ethics, law and politics—debates about power, autonomy, identity, human flourishing, equality, freedom and

against the regulation. Even if one does not accept the extreme position that procreative liberty is of central (indeed trumping constitutional) concern,<sup>110</sup> it is beyond cavil that these interventions restrict interests that many view as important with significant welfare implications. Again, restrictions on whether one can reproduce seem to impinge the most on what in other work I have referred to as a potential “right to be a genetic parent,”<sup>111</sup> and thus we should be particularly skeptical of using attenuated and speculative externalities as the basis for justifying such regulation. Even forced delays in the timing of reproduction or the denial of particular partner choices limit liberty in significant ways.

On some philosophical frameworks, there is a further question of whether one should aggregate small negative externalities or whether there are instead “irrelevant utilities.”<sup>112</sup> On

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other interests and values that give meaning to the claim that an identifiable harm matters.”).

110. See, e.g., JOHN ROBERTSON, CHILDREN OF CHOICE 16–18 (1994) (adopting a strong view along these lines).

111. See Cohen, *supra* note 15, at 1121–25.

112. Utilitarians typically aggregate small harms to many people and count the sum. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 23–24 (1971) (discussing the societal balance of present and future gains against present and future losses). The deontologist Frances Kamm has instead suggested that not all harms and benefits are equal, under what she calls the “Principle of Irrelevant Utility”: Suppose two almost identical individuals A and B are mortally ill and we have only enough serum to save one, but because of tiny differences in how much serum they need if we save A there will be enough serum left over to also cure person C’s sore throat, but if we save B there will not be. Kamm argues that it would be unjust in this circumstance to allocate the serum to A rather than B on this basis as opposed to holding a straight lottery between the two. If the sore throat is not enough to justify giving A preference over B when everything is equal, says Kamm, it is an “irrelevant utility” such that even if we could save not only C’s sore throat but a million such sore throats, for example, it would not matter; the utility bonus is irrelevant and therefore even aggregated in large quantities cannot count. Quite different, she claims, would be a case where in fact the serum enables us to save C’s leg, which would be a relevant utility. See F.M. KAMM, MORALITY, MORTALITY: DEATH AND WHOM TO SAVE FROM IT 144–63 (1993); Frances M. Kamm, *To Whom?*, 24 HASTING CTR. REP. 29, 31–32 (1994). On this view, one might also suggest there are irrelevant *disutilities*, and in our context even if the aggregate of small attenuated cost externalities “add up” to more than the concentrated negative externalities on those whose liberty is restricted by the intervention, those small cost externalities may be as irrelevant as sore throats. Kamm’s claim is controversial. For one critique see John Broome, *All Goods are Relevant*, in SUMMARY MEASURES OF POPULATION HEALTH: CONCEPTS, ETHICS, MEASUREMENT AND APPLICATIONS 727, 727–28 (Christopher J.L. Murray et al. eds., 2002) (suggesting the argument only proves that curing a sore throat does not matter *more* than fairness in this context, not that curing

views that adopt a model of irrelevant utilities, the Reproductive Externalities approach faces additional difficulties.

All that said, it may be that the attenuation of harms problem is fatal to Reproductive Externalities justifications of only some means of intervention but not others. That is, we might demand that the threshold point at which cost-externalities can count varies with the means by which the State seeks to influence the target decision and the concomitant invasion of liberty, if any. While cost-externalities may seem problematic to justify an intervention that invades bodily integrity or imposes criminal sanction, it seems unremarkable for the government to use informational interventions like public service campaigns for abstinence as a tool for minimizing even small and uncertain cost-externalities, and the other means seem somewhere in between. Thus, of all the regulations of reproduction discussed in Part I, abstinence education seems the most justifiable on this ground because it demands that the individual only delay coital intercourse until adulthood or marriage, and because (to return to the Taxonomy developed in Part I) the means of influencing the target reproductive decision is the least intrusive, the provision of information.<sup>113</sup>

In sum, the Reproductive Externalities argument seems only persuasive in a much smaller subset of cases involving high-probability harms that are likely to seriously impinge on the public fisc and where the means of influencing the target decision are less intrusive, which rules out most of the reproductive regulations discussed above.

## 2. Underinclusivity

Deploying the Reproductive Externalities argument to defend the interventions of Part I shows them to be problematically underinclusive.<sup>114</sup> There are many forms of reproduction producing comparable or worse Reproductive Externalities and nonreproductive externalities, where no such intervention has been imposed. If many of us would reject intervention in those cases, and those cases cannot meaningfully be distinguished,

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a sore throat is *irrelevant* or would never count for anything, and offering as counter example the U.K. Health Services' decision to give out millions of analgesics for headaches that at some level, due to health care rationing and fixed budgets, means that someone's life will not be saved).

113. See discussion *supra* Part I.A–B.

114. This is similar to a problem I have raised for the non-person-affecting principle approach as discussed in Cohen, *supra* note 5, at 481–512.

that casts doubt about how good this reformulation is as a BIRC substitute.

To wit, the genetic abnormalities resulting from brother-sister incest are less likely to result and also less serious in terms of their effects on the population of resulting children than those that result from the mating of carriers of Tay-Sachs or a number of other genetic disorders. And yet our government has not required mandatory screening for these disorders—an intervention which is less liberty-intrusive as to particular individuals than the criminalization of brother-sister incest since it would merely force individuals to have the information, not control their sexual relationships—and it certainly has not made it illegal for Tay-Sachs carriers to reproduce. If you think brother-sister incest may be unique on legal moralistic grounds, the same point could be made as to many of the other interventions I have discussed. Another example comes from the alleged effects on child welfare of single parenthood: the harms it is claimed will occur from single parenthood will be the same whether it arises coitally or through reproductive technology, such that someone who defends a restriction on reproductive technology use by single individuals ought to also apply the same limit to coital reproduction intended to give rise to single parenthood.

This underinclusivity might not be normatively problematic if there were meaningful distinctions between what is regulated and left unregulated, perhaps drawing on the difficulty and intrusiveness of attempts to regulate natural reproductive (as opposed to assisted reproductive) behavior. That response, however, fails to perfectly capture the current line of regulation in that we have directly regulated adult sexual activity by criminalizing brother-sister incest while leaving alone procreative activities that portend much more certain and significant Reproductive Externalities, so we ought to be cautious before fully buying into this possible distinction.<sup>115</sup>

One might try to more defensibly distinguish sub-categories of assisted reproductive technology use, for example by hiving-off assisted reproduction involving the gametes of partners in an intimate relationship from that using the gam-

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115. That said, one might avoid this problem by decriminalizing brother-sister adult incest but retaining the other interventions discussed or by arguing that brother-sister incest is special and criminalization is justified by a quite different and independent reason, such as the Legal Moralism I sketch below.

etes of strangers to that relationship. Whether that move is persuasive depends on one's valuation of different forms of procreative and parental autonomy. This is a big question, and one that deserves its own article, so I will just confine myself to a couple of brief remarks. The philosopher Daniel Statman has described the interest in reproduction as

the desire to achieve a kind of immortality by continuing to live through descendants, the desire to live vicariously through one's children, getting a second chance, as it were, the desire for the deep and enduring intimate relations that one hopes to achieve with one's offspring, the longing for a home, a nest, a secure place with a close network of relationships in which one belongs, and, in addition, the interest of couples to found a family.<sup>116</sup>

On one reading of that list, only reproduction by those without any genetic tie to the offspring (none of the cases in Part I) is distinguished. On a different reading, regulating reproduction that involves even one non-intimate partner (single, LGBT parents, commercialized surrogacy) is more justified because of the lower status of the interests represented by that kind of procreation. Would we be right in thinking that for the interest to be worth protecting, there must be a perfect overlap between the genetic partners, romantic partners, and rearing partners? Certainly some religious conceptions of procreation that condemn it outside of marriage view reproduction as worthy because it unifies an already existing romantic relationship, but that is a conception against which many of us would chaff. Even if this kind of move succeeds (and I am not at all sure it does) it still would not defend drawing the line between coital and assisted reproduction as such; instead it would counsel making a division between reproduction by single parents, however it is achieved, and reproduction by intimate partners. Thus, the underinclusivity seems to persist and demands that we either reject some of the interventions in Part I or add prohibitions on their coital equivalents. If we are unwilling to do so, that is some reason to doubt the Reproductive Externalities approach as a sufficient justification.

The underinclusivity problem seems even more pronounced on the intrafamilial externalities variant. Consider the decision as to how many children to have, one that is currently left largely unregulated in the West. It seems likely to me that the externalized cost to one existing child of having five additional siblings added to the family through coital reproduction is far

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116. Statman, *supra* note 15, at 226.

greater than the externalized cost to that child of having one additional child added if the additional child was conceived via an anonymous sperm donor; this seems true even if we used the social science data painting the most detrimental effects to children of being the product of anonymous donor conception. Thus, if we actually cared about preventing intrafamilial externalities, we should favor regulating the number of children one can have as well as (or instead of) donor anonymity. Of course, the echoes of China's one child policy are quite chilling in this regard.

### 3. The Problem of Enhancement

A third objection is that the Reproductive Externalities approach proves too much in that it ought to justify not only the moral wrongfulness of reproductive decisions to avoid what I have elsewhere called *diminishment*—producing a child who is on balance significantly worse-off as compared to the normal child, a child who will “experience serious suffering or limited opportunity or serious loss of happiness or good”<sup>117</sup>—but also a duty to engage in enhancement—to produce a child who is, on balance, significantly better-off as compared to the “normal” child (scare quotes used to emphasize the loaded nature of this term).<sup>118</sup>

There is no reason why the amount of externalities imposed by the average child should be given moral significance as a baseline. If the argument justifies regulating reproduction to reduce externalities in excess of those imposed by the normal child, it is not clear why it ought also not justify using the same means to prompt enhancement to further reduce externalities below the level of those imposed by the normal child, assuming the externalities are of the same size, attenuation, etc.<sup>119</sup> This is particularly troubling because, if the amount of externality-reduction one gets from certain enhancements are far greater than those from merely preventing diminishment, it would

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117. Cohen, *supra* note 52, at 363 n.46 (citation omitted).

118. Again, I have made similar points as to the non-person-affecting principle approach in Cohen, *supra* note 5, at 481–512.

119. It may be that as to particular enhancements and diminishments that assumption is not warranted, that the negative externalities avoided by legally requiring enhancement are smaller or more attenuated than those by legally requiring diminishment, but the opposite could also be true. In a sense, the first objection I consider to the Reproductive Externalities approach has been sensitive to this possibility, and here I am holding that objection constant and imagining the same externalities either way.

seem as though the State was *more* justified in employing means designed to prompt enhancement than some of the means employed in the examples in Part I. This too can be thought of as an underinclusivity problem, with the State's actions being problematic in taking steps to prevent parents diminishing their children but not pushing parents to enhance, when on the Reproductive Externalities approach the two are equivalent. Otherwise put, this is a baseline problem familiar to legal academics that asks why the level of externalities imposed by the normal child today is normatively significant.

Notice, though, what adopting a duty to enhance would mean: It is not enough to avoid an incestuous reproductive partner; one would have failed in one's duty if one did not choose as good a reproductive partner for one's child as possible. Similarly, it is not enough to abstain from reproductive sex during one's adolescent years. Instead a woman might fail in her duty to her child unless she waits until her career, wealth, etc., are in the ideal position for child-rearing. And, if genetic enhancements improving the lives of the children who result are possible, one who fails to use them would have failed in this duty. If endorsing the reproductive externalities approach required this conclusion, for many that would be a reason to not endorse it.

Still more troubling is what this means for legal regulation of reproduction. If, in spite of my objections in this Part, one takes the Reproductive Externalities approach to justify legal regulation of reproduction for cases involving diminishment, and the Reproductive Externalities approach does not distinguish diminishment and enhancement, then legal regulation (including potential criminal sanction) of reproduction to force enhancement is equally justified. Can this approach avoid that implication?

One response would be to try and distinguish reproductive activities that fail to enhance from those that diminish on an act-omission basis: failure to enhance is like failing to perform an easy rescue of a drowning person, which (in American law) is typically not made tortious or criminal. This approach will not work. Bracketing whether the act-omission distinction should have purchase even in the drowning person case, it seems particularly weak as to Reproductive Externalities. One can, for example, make the classic Legal Realist move of questioning the baseline: Why should the baseline level of acceptable externalities be that of the average child such that the fail-

ure to enhance beyond that is an omission, instead of treating a child that produced fewer externalities as the baseline and treat parents who fail to enhance as having acted? Indeed, it is not clear there are any true omissions here at all. In both the enhancement and diminishment context the individual has engaged in a reproductive act that has brought someone into existence and produced externalities.

A different response is that one need not be committed to a maximization thesis (or more accurately a minimization thesis as to net negative externalities); instead one could be more of a Sufficientarian about externalities. In normative ethics, Sufficientarians are a group of Welfarist theorists not committed to maximizing welfare but instead with ensuring that individuals do not fall below a critical threshold of whatever is the currency of distribution.<sup>120</sup> My imagined externalities Sufficientarian (I am not sure anyone has actually taken this position) is similarly not concerned with minimizing net negative externalities but instead in ensuring that net negative externalities do not go above a certain set threshold; the claim would be that while regulating reproduction to avoid diminishment is needed to prevent externalities above the threshold, requiring enhancement is unnecessary because without it the normal child is already at threshold. Even to construct the sentence reveals that this would be a tremendous just-so story: in order to maintain such a claim, one would need a Goldilocks theory explaining why the externalities imposed by the average child are just right, and I am aware of no theory that adequately defends such a claim.

A different response is that enhancements are distinguishable in practice because there are safety or theological concerns with genetic manipulation,<sup>121</sup> because some enhancements are not good for the child (to the extent they allow parents to hegemonically foreclose certain avenues for the child instead of securing a “right to an open future”),<sup>122</sup> because we lack sufficient foresight to pick good traits,<sup>123</sup> or because the availability of enhancements problematically exacerbates inequalities be-

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120. See Roger Crisp, *Equality, Priority, and Compassion*, 113 ETHICS 745, 757–63 (2003); Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 21–25 (1987).

121. See, e.g., Leon R. Kass, *The Wisdom of Repugnance*, in THE ETHICS OF HUMAN CLONING 3, 18–24 (1998).

122. BUCHANAN ET AL., *supra* note 69, at 156–203.

123. *Id.* at 179–82.

tween those who have access to enhancing technologies and those who do not.<sup>124</sup> Even assuming *arguendo* that these points were true as to all genetic enhancements, the arguments seem less apposite as to the duties towards non-genetic forms of enhancement that parallel our cases (delaying reproduction, choosing particular reproductive partners, etc.).

However, the assumption that the enhancement/diminishment line maps neatly on to the more-burdensome/less-burdensome one is problematic. There are some forms of enhancement that would require a fairly small restriction on liberty (for example, taking a particular dietary supplement once a week while pregnant that is shown to improve the intelligence of resulting children beyond the normal range) while there are some actions one would need to take to avoid diminishment that will involve significant limitations on one's life choices (for example, being unable to reproduce as a single or LGBT individual, or being subject to criminal sanction unless one chooses a reproductive partner other than one's genetic sibling with whom one is in love).<sup>125</sup> If what matters to us is the level of restriction in relation to the size of the externality, it would be better to draw the line on that criterion directly, rather than using the enhancement-distinction as a muddled heuristic—indeed I suggest doing so below. That would, however, still allow the State to legally require some enhancements.

It is still open to us to take the other horn of the dilemma and accept a symmetrical duty to enhance such that the state can justifiably use the same legal interventions as in Part I not only to induce substitutions of “normal” for diminished children but also to induce the substitution of enhanced children for “normal” ones. For some, this implication of the Reproductive Externalities approach may be unsettling enough to justify rejecting it. For others (of which I would include myself), the intuitive discomfort of supporting legally enforceable duties to enhance can be mitigated by introducing limiting principles such as requiring extremely large negative externalities and the least intrusive of the means of influencing the target reproductive decision.<sup>126</sup> However, (assuming we have rejected the externalities sufficientarian approach) whatever cabining we must do on the enhancement side to make the non-person-

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124. See *id.* at 187–91.

125. Cf. FEINBERG, *supra* note 14, at 163–65 (making a similar point for criminal law).

126. See *supra* Table 1.

affecting principle approach plausible ought to apply equally on the diminishment side. I believe many of the interventions justified by BIRC will not be supportable on the Reproductive Externalities approach, when so cabined, as I discuss in more depth below.

#### 4. The Problem of Positive Externalities

Suppose we are able to overcome the prior three problems and can restrict ourselves to preventing diminishment, in a way that avoids problematic underinclusivity or attenuation of externalities. Even if we accomplished all that, there is a further problem with Reproductive Externalities as a justification for legal intervention.

As against cost-externalities, which are negative, we have to also consider the positive externalities of the existence of these children. Just as courts in the wrongful life context are unwilling to conclude that from a child's own perspective the impairments it faces outweigh the positive benefits of its existence,<sup>127</sup> from a social welfare point of view we ought to be cautious in concluding that our (third-party) lives would be better if these children did not come into existence than if they did. Even if we assume *arguendo* that children raised by single parents, conceived through anonymous sperm donation, etc., impose externalized costs sufficient to justify intervention based on a Millian Harm Principle,<sup>128</sup> these children may also make significant social contributions to education, art, or wealth, because of these same conditions. Moreover, even if we became convinced (*arguendo*) that they made fewer contributions to social welfare than did the "better" children, that does not mean that their contribution is a *net* drain on the well-being of others.

Here I am somewhat eliding a further complicated question for the argument by mixing in what are strictly cost and noncost externalities. Suppose that the birth of these children produces a predictable increase in social spending on education programs and therefore increases tax burdens. On the positive externalities side, can that be outweighed by a very non-monetary benefit, for example the creation of more music by artists like Alicia Keys, who was raised by a single mother?<sup>129</sup>

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127. See *supra* text accompanying notes 87–92.

128. See JOHN STEWART MILL, ON LIBERTY (Albury Castell ed., F.S. Crofts & Co. 1947) (1859).

129. Alicia Keys Biography, BIOGRAPHY CHANNEL, <http://www.thebiographychannel.co.uk/biographies/alicia-keys.html> (last visited Apr. 18, 2012).

Or are benefits from the existence of music and increased tax burdens the kinds of things that belong in separate spheres of valuation such that they cannot be traded off?<sup>130</sup>

One possible response to all of these concerns would be to borrow from a suggestion Dan Brock and Derek Parfit have made in the non-person-affecting-principle approach that I have discussed elsewhere,<sup>131</sup> and limit the scope of the argument to same-number substitutions: we can restrict the argument to the claim that interventions are justified where an individual whose reproductive decisions are targeted will substitute a child that imposes *fewer* cost externalities on others than a child who would impose more—that is apply the argument only where the same number of children will exist and our regulation merely steers one into coming into existence instead of the other.

That solution comes at the cost of substantially narrowing the set of interventions for which externality-based arguments can be used. Interventions aimed at influencing whether individuals reproduce are completely untenable on this justification since the result is never a same-number substitution, and regulation of when or with whom an individual reproduces may have de facto effects on the number of children born that will push them out of the same-number category. For example, as I have noted elsewhere, if we required that all sperm donors be non-anonymous we are likely to both reduce the supply of donors and cause some parents to be unwilling to reproduce through sperm donation, thus changing the number of children who come into existence.<sup>132</sup>

Even when limited to same-number cases, the Reproductive Externalities approach is still susceptible to a more subtle objection: even if most children born without the regulation would impose more net negative externalities than those we would substitute in their place, it is possible that allowing their

130. Cf. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3–10 (1983); Dan W. Brock, *Separate Spheres and Indirect Benefits*, 1 COST EFFECTIVENESS & RESOURCE ALLOCATION 4 (2003), <http://www.resource-allocation.com/content/1/1/4>; Cohen, *supra* note 43, at 696–703.

131. Cohen, *supra* note 8, at 481–512; I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 441–42 (2012) [hereinafter Cohen, *Rethinking Sperm-Donor Anonymity*].

132. See Cohen, *Rethinking Sperm-Donor Anonymity*, *supra* note 131, at 435–37.

birth occasionally produces someone who creates such huge positive externalities to the world (a Mozart, a Van Gogh) that he outbalances the net negative externalities of the others. In a quite different context, Savulescu offers one response to this objection: even if you were worried that use of Preimplantation Genetic Diagnosis to select embryos without a predisposition to asthma for implantation might result in eliminating a Mozart, not choosing such embryos might result in that as well.<sup>133</sup> It is not clear the same point holds here in that one might think being a great artist is not independent to one's health and conditions of upbringing the way it appears to be independent of being an asthmatic. One might also make a hedge-your-bets-type argument that in the face of uncertainty it would be desirable that children of both types come into existence, or a synergy argument that great artists (to use my recurring example) emerge out of the interactions between children reared in different environments, although it is possible that the forms of reproduction we do not regulate create enough diversity in this regard. In any event, even if this objection is overcome, the limitation to same-number cases is likely fatal to most of the regulations of reproduction described above.

##### 5. Complications of Trading-Off Externalities Against the Value of Newly Created Children

Between a claim that net externalities are negative in a given case and the desire to prevent these births, there lie two other intellectual complexities that also push towards limiting the Reproductive Externalities argument to same-number cases.

**Externalities-Only?** The first complexity stems from distinguishing a position that truly cared only about externalities from these acts of reproduction versus a position that cared about externalities but also added to the calculus the value of these additional children's lives should they come into existence. I will illustrate using a crude utilitarian framework and some fictional numbers, but I emphasize that a parallel point can be made on any other Welfarist frame, which is to say this complexity is inevitable for any theory that cares about the welfare of individuals as a component of what makes the world good.<sup>134</sup>

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133. Julian Savulescu, *Procreative Beneficence: Why We Should Select the Best Children*, 15 BIOETHICS 413, 418 (2001).

134. Deontologists face a similar problem as well, since they often begin with a commitment to pursuing the Good, but merely add constraints and options.

Suppose a child born to a woman over age forty-five generates positive externalities for its genetic parents of 2, negative externalities for the world at large (other than the parents) of 3, but the child's existence and its own happiness adds to the world utility (or some other measure of welfare or well-being) of 2.<sup>135</sup> On a view that cared only about externalities the net externalities are -1, in which case one can conclude that the reproductive act poses net negative externalities and perhaps that action is justified. By contrast, on the view that the child's existence counts positively in the calculus, the calculus favors the reproductive act ( $2 + 2 > -3$ ). John Broome has described the externalities-only view as one that treats "the lifetime well-being of a person who is added to the world [as] is in itself ethically neutral," that is, "the goodness of the person's own life does not count ethically."<sup>136</sup>

The externalities-only view is simpler because it does not require us to balance the value of the child's coming into existence as against the negative externalities to others. However, it is probably wrong. Why would we ignore the value one's life has to favor only looking at externalities? Imagine that every individual in our population will have utility 4 and produce net negative externalities of -1. Imagine we have a choice of having 3 individuals in our population or 10. On the view that we ignored the utility of new individuals' lives, we ought to favor the smaller population because there will be more net negative externalities with the larger population, but it seems wrong to ignore the fact that we now have 7 additional lives, lives so good that they more than compensate for the net negative externalities in a global comparison. Indeed, in this hypothetical if we could add 5 billion people with utility 5000 (but each with net negative externalities -1), the externalities-only argument would say it would be wrong to do so, which seems perplexing. To be more tangible, it is possible we already live in a world where children produce net negative externalities—our planet

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135. That this number is positive is significant because it means the child has a life worth living.

136. John Broome, *Should We Value Population?*, 13 J. POL. PHIL. 399, 400 (2005). At this juncture it is worth reiterating that here (as throughout the project) I am not claiming that children are harmed if they are not brought into existence. Instead I share with others the view that "no one is harmed in not being created, because there is no one to be harmed if we do not create someone." Kamm, *supra* note 75. However, there is a difference between saying X is harmed by not being brought into existence, and that in evaluating whether a world where X is brought into existence is preferable we ought to consider (at least in part) the goodness of X's life.

is already heavily populated. If all we cared about were net negative externalities, it may be that something like China's one child policy should be favored, even if we knew every additional child produced would have a quite happy life and the sum of that happy life and its externalized benefits would far outweigh the net negative externalities. I have tried to make this argument here in a less formal and more intuitive way, but others have supplied more formal versions that are also quite persuasive.<sup>137</sup>

**Average or Total?** Assume we reject the externalities-only view and instead adopt a view that counted the child's existence and the happiness it might bring into the global calculus. We now face the second complexity: do we treat the child's welfare as counting in a total or an average way, akin to a problem I have discussed with non-person-affecting principles.<sup>138</sup> As part of a consequentialist theory—I will again use utilitarianism instead of other variants of consequentialism for explanatory simplicity<sup>139</sup>—one could have two quite different views about how to aggregate utility between persons. Total utilitarians would sum up the utility of every individual in the set such that a population of 100,000 people with utility of (illustratively) 5 each would be more desirable than (indeed twice as desirable as) a population of 50,000 people with utility 5 each; by contrast, average utilitarians would divide all utility by the number of individuals in the population such that both of those hypothetical populations are equally desirable.<sup>140</sup> On the total view, each new child's welfare counts against the net negative externalities. By contrast, on the average view, it is the effect of the new child's welfare on the average utility that is traded-off against its effect on negative externalities.

Let us return for a moment to my earlier example—the choice between a population of three or ten, each with utility four and net negative externalities of negative one. On the total view, the addition of the seven other individuals would be favored since it adds four more per child, or twenty-one in total

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137. *E.g.*, LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 387–90 (2008); Broome, *supra* note 136. Broome suggests that while the welfare of these not-yet-existing children should count in evaluating the goodness of a state of the world, it may *not* create a responsibility to produce these children, thus avoiding the problematic suggestion that there is a duty to reproduce in a way that maximizes total utility. Broome, *supra* note 136, at 412–13.

138. See Cohen, *supra* note 5, at 481–512.

139. Once again, the equivalent problem is faced by deontologists as well.

140. See, e.g., RAWLS, *supra* note 52, at 260–62.

(which, of course, ultimately have to be traded-off as against the net negative externalities of negative four). On the average view, we ought to be indifferent as to whether these seven people are added to the population—the average utility of the children born will be four either way. One could also construct cases where the total utilitarian favored one population and the average affirmatively favored another.<sup>141</sup>

Which view should we favor, total or average? Kaplow has offered two thought experiments to show why the total view seems superior.<sup>142</sup> Imagine that we are choosing between population A of 10 individuals with utility 100 or population B of nine individuals with utilities of 110 each. The total view prefers A, the average view prefers B. Kaplow's first argument asks us to imagine ourselves behind a veil of ignorance uncertain whether we are one of the individuals who exist in both A or B, or just in A. He then suggests that rational maximization would lead us to prefer being one of the 10 individuals who do certainly exist in population A versus having a 90% chance of being one of the actual individuals and a 10% chance of not existing.

Perhaps motivated by uncertainties as to the value of veil of ignorance type arguments when nonexistence is involved, Kaplow also offers a second argument. Suppose we begin with population C of 10 individuals with utility 100 (such that total utility is 1000 and average utility is 100). Now suppose that we could implement a regime that would raise each existing individual's utility to 105 and add an additional individual with utility 28 that is above the threshold of a life worth living. Call this population D (total utility is 1078, average is 98). Under a variation of the Pareto principle, Kaplow suggests D is better than C, because all individuals who are alive under either regime prefer D to C, even though C has lower average utility—everyone is made better off, no one is made worse off. This alone suggests total is a better measure than average, because there are Pareto-superior distributions where average utility has decreased while total utility has increased. Finally, imagine we can “implement a further reform that equalizes utility for all individuals at an average level that is one unit higher than that in [population D],” call this population E (total utility

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141. See Cohen & Chen, *supra* note 12, at 521 n.141 (demonstrating the possibility of divergences between total and average utilitarianism with several examples).

142. The following description is drawn (with some slight simplifications and clarifications) from KAPLOW, *supra* note 137, at 387–89.

is 1089, average is 99), which “raises total utility and also distributes it more equally, which raises social welfare under any standard [social welfare function] (utilitarian or strictly concave).”<sup>143</sup> In moving through two steps from C to E “we have moved from a population of 10 with a utility of 100 each to a population of 11 with utility a 99 each,” and “[i]f each step involves an increase in social welfare, then so must the combination.”<sup>144</sup>

If the total view is adopted it will be harder for the Reproductive Externalities argument to justify the reproductive regulations discussed in Part I, because they have a tendency to reduce the number of children brought into existence, each of whom adds to welfare.

What holds us back from adopting the total view wholesale? It threatens to lead to what Parfit has termed the Repugnant Conclusion—“[f]or any possible population of at least ten billion people, all with a very high quality of life, there must be some much larger imaginable population whose existence, if other things are equal, would be better, even though its members have lives that are barely worth living.”<sup>145</sup> It “would imply that we should increase total happiness slightly by vastly increasing the population, even though we thereby make every existing person much worse off,” and it is “[o]nly person-affecting principles [that] seem likely to avoid unacceptable implications like the Repugnant Conclusion, since only they require that a reduction in suffering or an increase in happiness be to a distinct individual.”<sup>146</sup> This is illustrated in the top half of Diagram 1: we could vastly expand our population from the bar on the left (seven billion people with utility five each = thirty-five billion total utility) to the bar on the right (eighty billion people with utility .5 each = forty billion total utility). This would result in a much larger number of people with lives just barely worth living, thus increasing total utility but producing people with much worse lives than we currently have.

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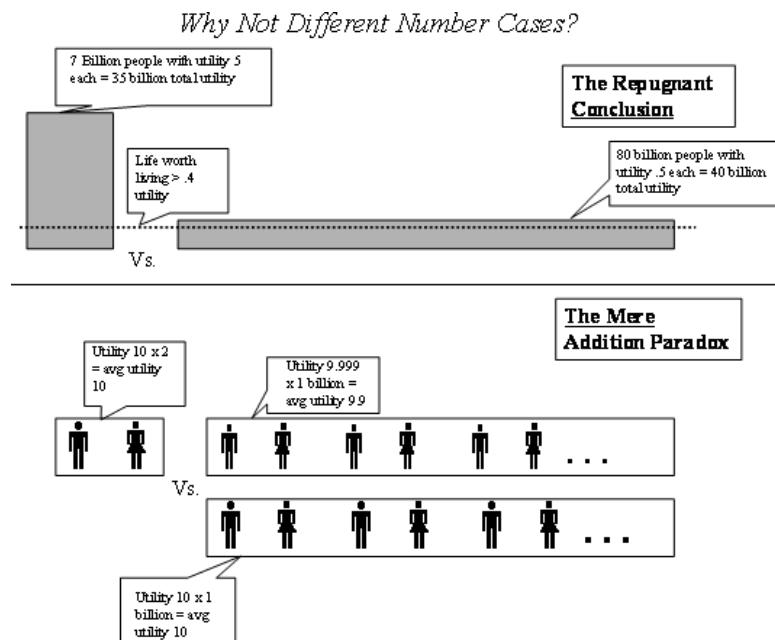
143. *Id.* at 388.

144. *Id.*

145. PARFIT, *supra* note 69, at 388; see also KAPLOW, *supra* note 137.

146. BUCHANAN ET AL., *supra* note 69, at 254.

Diagram 1



However, average utilitarianism *also* appears to lead us to a different kind of repugnant conclusion, which Parfit calls the “Mere Addition Paradox” (represented in the lower half of Diagram 1), that the world would be better if Adam and Eve, both with very high utility existed alone rather than if in addition to Adam and Eve there also existed fifty billion other people with very good lives but utilities just below Adam and Eve (say 9.99999 repeating). That is, the latter world is a worse one on the average view, since the addition of these people has diminished the average from what it was with just Adam and Eve existing. This conclusion seems wrong. Indeed, perhaps still more strangely, the average utilitarian should be *indifferent* as to Adam and Eve, each with utility ten, existing versus Adam and Eve plus fifty billion other people, all with utility ten, existing, for in each case the average utility is exactly the same.

Both Brock and Parfit candidly admit that the only way to avoid both of these paradoxes is to provide a comprehensive theory that mixes person-affecting and non-person-affecting principles—they call it “*Theory X*”—but note that no such com-

prehensive theory has yet been formulated.<sup>147</sup> Therefore, as I have discussed elsewhere, Brock and his co-authors limit the scope of the application of non-person-affecting principles to same-number cases.<sup>148</sup> Only in these cases—where the number of individuals brought into existence stays the same and we merely substitute higher for lower welfare children—can we be sure that the move is desirable. This same solution is available here. As discussed above, we could limit the Reproductive Externalities approach to same-number substitution cases, but only at the cost of limiting the scope of cases to which the Reproductive Externalities approach will justify regulating reproduction.<sup>149</sup>

## 6. Internalizing the Externality

In many instances, when legal arguments identify negative externalities as a problem the preferred solution is to redesign the system such that individuals internalize the externality. In principle, a form of that argument is available here. If the prob-

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147. BUCHANAN ET AL., *supra* note 69; PARFIT, *supra* note 69, at 390.

148. BUCHANAN ET AL., *supra* note 69. See also Cohen, *supra* note 8, at 489.

149. If forced to choose, there may be good reasons to favor the total view. See KAPLOW, *supra* note 137. See generally Tornbjörn Tännström, *Why We Ought to Accept the Repugnant Conclusion*, 14 UTILITAS 339 (2002) (arguing the total view and resulting repugnant conclusion is not actually repugnant). In regards to “hybrid” views that apply total utilitarianism when the population is small but average utilitarianism when the population approaches the size of ours, see Philip G. Peters, *Implications of the Nonidentity Problem for State Regulation of Reproductive Liberty*, in HARMING FUTURE PERSONS 317, 326 (Melinda A. Roberts & David T. Wasserman eds., 2009) (citing Thomas Hurka, *Value and Population Size*, 93 ETHICS 496, 497 (1983)), I have argued that any view relying too heavily on average utilitarianism seems problematic in how it identifies what is wrong with reproduction when we believe it to be wrongful. See Cohen, *supra* note 8, at 489–93. Such views suggest that the wrongfulness of a reproductive act depends on whether the child created is above or below the average utility of all other existing individuals—but that seems deeply counterintuitive. Why should the wrongfulness of my reproductive activity be measured relative to that of other reproducers in my society? The average utility of the world is quite different today than in 1850, which means that producing the same child could be morally permissible in 1850 but morally impermissible today. Consider your own life. Most of us think that our parents did not act wrongly by producing us. And yet this approach would suggest that to know if that is right we would have to compare our utility with that of all other persons in society at the moment of our birth, and if we fall below the mean our existence could validly (indeed should) have been prohibited. Indeed, if tomorrow, other parents begin having children with much higher utility than our own utility, then our reproduction which was permissible today would suddenly become wrongful tomorrow, notwithstanding that no fact about our own lives have changed. This is deeply counterintuitive.

lem with the kinds of reproduction we are discussing is that it imposes costs on third parties in the form of governmental spending, we could in theory allow individuals to buy their way out of the problem by putting up a bond in advance for expenses.<sup>150</sup> Of course, estimating in advance the cost of the externalities would be difficult but we could set it conservatively at five times our best guess of the cost in order to be safe.

While this may seem fanciful, in some instances it would actually not be very hard to implement: we could, for instance, impose a surtax on IVF for single parents or on a commercialized sperm, egg, or surrogacy provision. The State could then (theoretically) use that extra revenue to offset the externalities caused by these children through things like grants to schools, the juvenile justice system, etc. Doing so would not only substitute a less intrusive means of influencing the reproductive decision (taxation as opposed to criminal sanction) but also a tailored one that sought to target the precise harm that justifies intervention.

Such a move would, of course, pose inequality concerns since some individuals would not be able to pay the surtax to access reproductive technologies. Such inequalities do not strike me as *particularly* worrisome for at least three reasons. First, these costs are not an arbitrary tax but one that is aimed to make whole those harmed by the reproductive activity, thus one analogy is to tort damages. The fact that some tortfeasors are wealthier and better able to pay for their compensatory tort damages (and thus less deterred from committing the tort in the first place) does not make us think tort law is inappropriately inequitable, and it is not clear it should in this situation either. Second, this would arguably be consistent with our current tendency in the United States to ration access to many health care goods by ability to pay. Although many find that tendency unjust, against this background, taxing some forms of reproductive-technology use looks unexceptional. The solutions to the larger problem—redistribution at a high level—might take care of this problem too. Third, we could always subsidize the poor as we do elsewhere in the health care system.

To be sure, there are practical issues here, but the more important theoretical pay-off is that in principle the State has

150. Cf. Robertson, *supra* note 69, at 18 (noting offhand in the case of genetic abnormalities that “even if the conditions are more serious, if the parents have knowingly accepted the risk and have the resources to rear their child, no harm to others will occur”).

no good reason to intervene in the ways discussed in Part I as to those parties willing to pay for the externalities caused by their reproduction.

### 7. The Specter of the New Eugenics

Like the Non-Person-Affecting Principle approach, the Reproductive Externalities approach threatens to rely on objectionable eugenic premises.<sup>151</sup> Expressively, it threatens to suggest to a member of the set of individuals it targets (or at least to the children who sneak past its gates and come into existence): “we are expending state resources to prevent people like you from coming into existence because we think the world is better off if people like you (physically disabled, mentally retarded, raised by LGBT or single parents, etc.) were replaced by other people.” This is a far cry from the goal of preventing harm to vulnerable populations that underlies much of the appeal of BIRC reasoning. This is not to say that such reasoning is necessarily invalid, but it does require a direct confrontation with the eugenics movements of old and the question of what made the old eugenics wrong.

In United States law, eugenics is most famously associated with Justice Holmes’ claim in *Buck v. Bell* that “[t]hree generations of imbeciles are enough” as a reason to uphold a Virginia policy of involuntarily sterilizing an allegedly “feeble-minded” person who had already produced one “feeble-minded” child.<sup>152</sup> Eugenics was notorious as a central part of the Nazi movement that seized on the notion of blood, called for the purification of their nation’s gene pool in order to “regain the nobility and greatness of their genetically pure forebears,” and gave rise to prohibitions on sexual relations between Jews and Aryans, “Genetic Courts passing judgment on [] genetic fitness,” marriage advice clinics, and ultimately mass sterilization and euthanasia programs targeting Jews and other minorities.<sup>153</sup>

It may seem fatal that the Reproductive Externalities justification, with its focus on how the birth of certain kinds of children harms the rest of us, echoes the rhetoric of this movement. As Buchanan and his co-authors caution, “the central theses of a social movement, including its moral premises, ought not to be dismissed because of the intellectual and ethical failings of its adherents.” Yes, “[e]ugenics is recalled as the Nazis’ racial

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151. Cohen, *supra* note 5, at 500.

152. *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927).

153. BUCHANAN ET AL., *supra* note 69, at 38–40.

doctrine, which it was, but to be a eugenicist, then or now, is not tantamount to being a Nazi," or at least not necessarily.<sup>154</sup> In more colloquial terms, we ought to be wary of trying to score points by comparing our opponents to Nazis.

Elsewhere I have discussed two arguments distinguishing the "new" eugenics represented by the reproductive regulations discussed above and the old eugenics movements.<sup>155</sup>

The first argument seeks to draw distinctions between the means of regulating reproduction used. To summarize my conclusion in the companion piece, I think this distinction cannot save reproductive regulations that use criminal law means, but that things are less clear as to some of the other less intrusive means.<sup>156</sup> Imagine the State decided not to enforce surrogacy contracts only as to a category of parents who were likely to produce significant negative Reproductive Externalities—some states already refuse judicial preclearance (and thus enforcement) of surrogacy agreements when the intending parents are not married heterosexuals.<sup>157</sup> Or suppose that instead the State sought to fund abstinence education programs that target only particular subgroups likely to produce these negative Reproductive Externalities, for example those with heritable disabilities such as deafness. This would certainly be less bad than involuntarily sterilization, but even the funding of informational interventions to dissuade reproduction carries with it a worrisome message. And while one might distinguish the message, "your existence is so unworthy that it should be prevented" from "your existence produces negative externalities that society should not be forced to bear," that distinction is one that is likely to be lost on most listeners. Still at least for the less intrusive means, this may offer some room between the new and old eugenics.<sup>158</sup>

A second argument would seek to distinguish the old eugenics movement's targeting of genetic unfitness and the transmission of genes as the source of harm from the new eugenic movement, which in some cases is focused on preventing children from coming into being whose *rearing conditions* (single parent, unaware of parent's identity, etc.) produce negative

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154. *Id.*

155. Cohen, *supra* note 5, at 502–03.

156. *Id.*

157. See Daar, *supra* note 25, at 43.

158. Cohen, *supra* note 5, at 503.

externalities.<sup>159</sup> Although tempting, I have explained in the companion article why I do not find that distinction satisfying: while these examples may not require condemning a person *as a repository of genes*, in some instances they do nonetheless condemn the person, the approach requires a very strong conception of genetic essentialism or luck egalitarianism that I think may be problematic; to the extent we are restricting individuals from reproducing due to criteria that are not their fault, the gap between the new and the old eugenics thus narrows.<sup>160</sup>

For all these reasons, I find the difficulty in distinguishing the practices discussed in Part I from the *old* eugenics to constitute an additional problem faced by the Reproductive Externalities, but perhaps not as serious a problem as the others I have outlined above.<sup>161</sup>

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159. *Id.*

160. *Id.*, at 503–04.

161. To be clear, finding any of these approaches unconvincing from a normative/political theory perspective does not necessarily mean that they cannot serve as a *constitutionally permissible* justification for regulation under existing U.S. federal constitutional law doctrine. As I have discussed elsewhere, what constitutional standard applies to regulations of reproduction, especially those relating to reproductive technology, is underdetermined by existing doctrine and very unclear. *See id.* at 513–17. If strict scrutiny applied there would be clear problems of underinclusivity hinted at above, *cf. Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (stating that Oklahoma’s distinction between sterilization of “those who [had] thrice committed grand larceny” and those who had thrice embezzled was constitutionally problematic), as well as overinclusivity problems to the extent there are blanket policies for single and LGBT users rather than individualized parental fitness testing. *See Rao, supra* note 28, at 1479–88 (discussing equal protection challenges for denials of access to reproductive technology). Further, it is not completely clear that preventing Reproductive Externalities qualifies as a “compelling state interest” under strict scrutiny. On the one hand, Holmes’ justification in *Buck v. Bell* that “[it] is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind,” 274 U.S. 200, 207 (1927), while never overruled, is so reviled it might be an antiprecedent, rendering problematic the Reproductive Externalities approach by association. On the other hand, perhaps the family privacy cases discussed in Part I might serve as guidepost: only very large externalities or externalized costs relating to the ability of resulting children to don the mantle of citizenship would be compelling, but the State is not free to interfere in order to realize some Platonic or Spartan ideal society.

On rational basis review, by contrast, preventing even small, attenuated, or not clearly net negative externalities can count as “legitimate” state interests justifying regulation. Motorcycle helmet laws are a good analogy and have been upheld based on the disability costs born by society of drivers who are injured without helmets. *E.g., Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989); *see also* Melissa Neiman, *Motorcycle Helmet Laws: The Facts, What Can Be Done to Jump-Start Helmet Use, and Ways to Cap Damages*, 11 J. HEALTH

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The foregoing discussion suggests that the use of Reproductive Externalities as a justification for regulating reproduction is much more fraught and less convincing than it might have initially appeared. Nonetheless, for reasons that will become more clear after I discuss the other possibilities in the remainder of this Article, the externalities approach is likely the best of a bad lot. What the limitations and concerns I have raised here suggest, though, is that if we were to go beyond best interests and be honest about Reproductive Externalities as the reason for regulating reproduction, we would settle on a much smaller swath of such regulation. In particular, we would be justified in regulating only cases where (1) same-number substitutions were likely, (2) externalities are net negative, large, and not attenuated, and (3) we could not plausibly derive a scheme by which individuals internalize their externalities, especially given the implications for enhancement and the expressive closeness to the eugenics movement.<sup>162</sup> Moreover, returning to the framework introduced in Part I.B.2, the showing we should demand on these three factors should be greater when the means of influencing the target decision is more, rather than less, (negative) liberty-limiting; thus, a more persuasive showing on these factors should be required when the State seeks to prohibit certain reproductive activities altogether through its criminal law than when it uses informational interventions.<sup>163</sup>

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CARE L. & POL'Y 215, 236–37 (2008) (listing cases that analogize the “right to choose to wear a helmet to reproductive decisions”). Under- and overinclusivity are not problems on rational basis review. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (noting that courts will defer to legislative judgments that “[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. . . . [o]r the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . [o]r t]he legislature may select one phase of one field and apply a remedy there, neglecting the others”).

162. See discussion *supra* Part II.A.5–II.A.7.

163. Most forms of regulating reproduction that satisfy these limitations on the Reproductive Externalities approach (especially as to same-number cases, and less intrusive means of regulating reproduction) can also be endorsed on the non-person-affecting principle approach discussed in *Regulating Reproduction*. Cohen, *supra* note 5, at 481–513. While I have some doubts about that approach and find Reproductive Externalities somewhat preferable, the fact that there is an overlapping consensus between these two approaches as to some cases is further reason to think that such regulation is most justified in those cases.

Applying this analysis to the existing regulations of reproduction discussed in Part I suggests few if any will be justified on this account. The two best candidates seem to be abstinence education and the prohibition on incest between adult brothers and sisters, but neither is assured. Abstinence education seems more likely to be a same numbers case, and the means of influencing the target decision is informational, but the externalized harms are uncertain, small, and attenuated. The genetic abnormalities from adult brother-sister incest are likely a same number case and to portend larger and less attenuated externalized costs than the other examples from Part I.B.1, but given that they use criminal prohibition as the means of influencing the target decision we ought to demand a very persuasive showing in order for this approach to be justified. I think one's ultimate verdict may depend on a separate normative judgment about how much of an imposition it is to have a possible romantic partner declared *verboten*. The *yuck factor* here may tempt us to dismiss the interest of the individuals in this case as weak, but perhaps a broader reflection on the importance of partner choice—both in rising social movements regarding gay rights, and in the literary tradition of forbidden love epitomized by *Romeo and Juliet*<sup>164</sup>—might cause us to reconsider. In any event, what this analysis suggests is that on the Reproductive Externalities approach the State would be far more justified in discouraging adult brother-sister incest if it used a less liberty-limiting means of influencing the target reproductive decision.

As I have foreshadowed before, in the end I think the Reproductive Externalities approach, even with all its problems, will end up being the best alternative to the now-dismissed BIRC framework. In order to substantiate that claim, though, the next two Parts consider the remaining alternatives.

### III. WRONGING WHILE OVERALL BENEFITING

The Non-Identity Problem renders problematic the idea that children are harmed if brought into existence with lives worth living. The Reproductive Externalities approach shifts the emphasis from *harm to resulting child* to *harm to third parties*. The approach I develop in this Part can be understood as shifting the criteria for moral wrongfulness from harm to a conception of wrong *absent* harm, or as offering a conception of harm where the fact that an individual is overall benefited is

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164. See generally WILLIAM SHAKESPEARE, ROMEO AND JULIET.

insufficient to save the act from being wrongful.<sup>165</sup> I focus on adapting one version of this approach suggested by Seana Shiffrin in the wrongful life context, which I think is the most fully fleshed out version developed with an eye to legal application, but other versions of this approach also exist.<sup>166</sup> Shiffrin's focus is on tort liability for wrongful life liability, but as I discuss below it is possible one might extend her views as support for criminalizing conduct or some of the other means of regulating reproduction discussed above.

Shiffrin rejects what she calls the "comparative model" of harm that treats harm and benefit as representing two sides of the same scale and its "principle that one may inflict a lesser harm on someone simply to benefit him overall, when he is unavailable to give or deny consent."<sup>167</sup> She instead endorses an asymmetrical noncomparative approach on which "harm," as defined by Shiffrin, is associated with "absolute, noncomparative conditions (e.g., a list of evils like broken limbs, disabilities, episodes of pain, significant losses, death, etc.)" and "benefit" is associated with "goods (e.g., material en-

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165. See Cohen, *supra* note 5, at 518. It would be nice to call this "harmless wrongdoing," but because Feinberg has used this moniker to cover Legal Moralism as discussed below, see generally JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1984) (discussing morally wrong conduct that causes no harm or violates no rights), I use this somewhat clunkier term to avoid confusion.

166. Shiffrin, *supra* note 6, at 119–20; see, e.g., Davis, *supra* note 7, at 12 (arguing that "disabled persons wishing to reproduce themselves in the form of a disabled child. . . . violate the Kantian principle of treating each person as an end in herself and never as a means only" because "they define the child as an entity who exists to fulfill parental hopes and dreams, not her own"); Harman, *supra* note 7 (arguing that "[a]n action harms a person if the action causes pain, early death, bodily damage, or deformity to her, even if she would not have existed if the action had not been performed" and "reasons against harm are so morally serious that the mere presence of greater benefits to those harmed is not in itself sufficient to render the harms permissible: when there is an alternative in which parallel benefits can be provided without parallel harms, the harming action is wrong"); Kamm, *supra* note 7 ("[C]reators owe their creations, at reasonable cost, certain things that I call the 'minima. . . .' [which] involve more than just things that make lives barely worth living. . . . [such that] I do not think that giving half a loaf, as distinct from giving a whole loaf and then taking half away, is permissible if the half a loaf falls below the minima."); Woodward, *supra* note 7, at 813 (arguing from a principle that "it can be wrong to adopt a course of action which will both bring certain obligations into existence and make failure to meet them unavoidable, even though this course of action affects another's overall interests as favorably as any other course of action would").

167. Shiffrin, *supra* note 6, at 119–22, 127.

hancement, sensual pleasure, goal-fulfillment . . .) . . .”<sup>168</sup> Shiffrin then distinguishes between two types of benefits, those that represent the “removal[] from or prevention[] of harm” and a residual category she terms “pure benefits.”<sup>169</sup> She argues for a principle that it is permissible to inflict a lesser harm to remove or prevent a greater harm, but wrong to do so in order to confer a pure benefit.<sup>170</sup>

For some cases both her view and the comparative view produce the same result. To use Feinberg’s example, when a rescuer must break the arm of an unconscious person (who therefore cannot consent) in order to save him, the comparative view suggests the action is right because the individual has been overall benefited, the harm of the broken arm is outweighed by the benefit of being saved.<sup>171</sup> On Shiffrin’s view the action is also permissible, but for a quite different reason, because the harm of the broken arm is permissible because it is done to avoid a greater harm.<sup>172</sup>

In other cases, though, the two views diverge. Shiffrin illustrates using the fanciful hypothetical (hereinafter I will refer to it as *Wealthy/Unlucky*, and I mention precisely the facts she does)<sup>173</sup> of a wealthy inhabitant of an island (*Wealthy*) who cannot set foot on another island nor communicate with its inhabitants. The other island’s inhabitants are comfortably well-off, but *Wealthy* desires to make them richer. The only way for *Wealthy* to do this is to drop gold bullion cubes each worth five million dollars from his airplane while passing over the island knowing there is some risk he may hurt someone. Most people are delighted by the gold drop, but one person (*Unlucky*) is hit by a falling cube and his arm is broken. If *Unlucky* thinks that all things considered he has benefited since the cost of repairing his arm is less than five million dollars (though he is unsure whether he would have consented *ex ante* to the risk) then, on the comparative view the action is not wrongful—a harm has been inflicted to produce an overall benefit.<sup>174</sup> On Shiffrin’s view, however, the action was wrong, because harm

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168. *Id.* at 123.

169. *Id.* at 124.

170. *Id.* at 124–27.

171. JOEL FEINBERG, FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 27 (1992).

172. Shiffrin, *supra* note 6, at 125.

173. *Id.* at 127–28 (setting out the full hypothetical).

174. *Id.* at 128.

was inflicted without prior consent to bestow only a “pure benefit” not the avoidance of greater harm, and therefore Wealthy owes compensation to Unlucky for that harm.<sup>175</sup> Shiffrin thinks most of us would conclude that Wealthy acted wrongfully,<sup>176</sup> suggesting her noncomparative view is the correct one.

Shiffrin then extends the idea to wrongful life cases, suggesting that no one is harmed by not being created, such that being born confers on the child only a pure benefit but not the avoidance of harm.<sup>177</sup> We can apply her analysis to the kinds of cases discussed in Part I: for example, in brother-sister incestual sex one can argue that the parents have without prior consent (which would be impossible in all our cases) imposed a harm on the child not to avoid a greater harm, but to bestow a pure benefit (existence). Therefore, they have acted wrongfully even though they have benefited the child overall.<sup>178</sup> While Shiffrin ultimately marshals this analysis to justify tort compensation, at first glance one could also adapt the same argument to justify any of the means of influencing the target reproductive decision. Still to be fair, going forward I will ask the reader to imagine these arguments as *Shiffrin-esque* rather than Shiffrin’s own argument.

In the remainder of this Part, I consider several problems with applying Shiffrin’s framework to justify regulating reproduction in our cases, which I order from more general to more specific, namely: (1) in general the noncomparative approach to harm is implausible; (2) as applied to reproduction, the argu-

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175. *Id.* at 128–29.

176. *Id.*

177. *Id.* at 119–20.

178. At one point Shiffrin suggests that even if in a case like Wealthy/Unlucky one is skeptical about the noncomparative view of harm and thinks that the pure benefit (if great enough in amount) can morally justify the imposition of harm, there are two other features of the procreative case that makes her argument even stronger there: “[i]n most cases, the absence of a pure benefit is experienced by a person or, otherwise makes a difference in the content of his life” leading to the “strength of the moral impetus to bestow pure benefits,” in that we can say Unlucky’s life is better with the benefit and we think making his life better is good. *Id.* at 134. But “[i]n the case of procreation, though, this sort of moral reason for beneficence is not generated, because the potential beneficiary does not exist” such that “[e]ven if the failure to bestow a benefit were on a par with harm [as the view Shiffrin rejects contends], the failure to be created is a ‘harm’ that would never, even indirectly or as an opportunity cost, affect an *ongoing* person’s life”; that is, “[t]he fact that the ‘harm’ or absence of benefit represented by not procreating will not affect an existent person or her life in progress renders the benefit bestowed by creation far less morally significant.” *Id.* at 135.

ment either proves too much (in suggesting that all procreation is *prima facie* wrongful) or too little (in that many parents already share in the burdens of their children produced through delinquent forms of reproduction); (3) Shiffrin's Wealthy/Unlucky intuition pump contains several problematic elements, does not map properly on to procreation, and is too quick in dismissing the possibility of hypothetical consent; (4) the approach faces particular problems in justifying means of influencing the target reproductive decision that involve criminalization of behavior or impinging on bodily integrity. While I ultimately consider her approach unpersuasive, I should make clear at the outset just how brilliant I find Shiffrin's argument.

#### A. THE PLAUSIBILITY OF THE NONCOMPARATIVE APPROACH TO HARM

Shiffrin's key insight is to examine how wrongful life cases look different when harm and benefit are disaggregated through a noncomparative model that distinguishes harm done to avoid/prevent greater harm and harm done to confer a pure benefit. Thus, her approach is only as plausible as that noncomparative approach. How plausible is the noncomparative approach?

To begin with, it requires a rejection of most (if not all) forms of consequentialist reasoning. Consequentialist theories aggregate harm and benefit both within and across individuals as opposite inputs into an individual's welfare, such that some amount of any harm (short of death perhaps) can be outweighed by some amount of benefit. Shiffrin's view instead suggests that pure benefits cannot cancel out unconsented to harms such that there is a side-constraint against maximizing what consequentialists might otherwise regard as the Good. Of course this is not fatal to her view: among philosophers, deontological theories that constrain consequentialist reasoning are highly favored, although even those theories usually conceive of deontological side constraints being applied to baseline consequentialist theories. In any event, all I mean to emphasize is that her noncomparative view of harm requires much more of a break with consequentialism than do other solutions to the Non-Identity Problem we have so far canvassed, and that alone may make it implausible for those with contrary fixed moral theory commitments.

Second, outside of reproduction, in areas such as tort and criminal law theory more generally, several authors have at-

tacked the noncomparative theory of harm espoused by Shiffrin. In work on the comparative nature of punishment, Adam Kolber offers this kind of example: Stuart viciously beats a homeless man, after which Tommy, unaware of Stuart's action, subsequently plucks three hairs from the homeless man's head.<sup>179</sup> Because, according to Shiffrin's noncomparative model of harm, the homeless man is actually worse off after Tommy's actions than after Stuart's, Kolber suggests that Shiffrin's view would say that Tommy harmed the homeless man more than Stuart did, that this conclusion is absurd and only avoidable by importing comparative notions, and that thus Shiffrin's view "cannot properly measure harm severity."<sup>180</sup> In his work on tort theory, Scott Hershovitz has suggested that the paradoxes Shiffrin identifies with the comparative theory of harm can be resolved by being more precise and suggesting that harm is not just any setback of interest, but a setback of someone's interest that violates a right they have.<sup>181</sup> Others have also critiqued the noncomparative approach.<sup>182</sup>

For those persuaded by these critiques, the noncomparative approach is flawed to begin with and therefore Wronging While Overall Benefitting will not work as a justification for regulating reproduction. For those not persuaded by these critiques, though, in the remainder of this Part, I show why this approach still will fail.

#### B. PROVING TOO MUCH AND PROVING TOO LITTLE

Unlike the other BIRC-substitutes canvassed in this Article, Shiffrin's framework might justify all (rather than only a subset) of the regulations of reproduction discussed in Part I. However, this capaciousness is also worrisome in that it threatens to prove too much and condemn all procreation: as Shiffrin recognizes, her argument suggests that wrong has been done not only in the exceptional case of wrongful life but also in all normal, healthy procreation, because even in the normal case the child "must endure the fairly substantial

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179. Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1579–81 (2009).

180. *Id.* Perhaps a proponent of Shiffrin's view might refine the theory to be comparative as between harms, but not as between harms and pure benefit, to avoid this critique.

181. Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147, 1164–66 (2006).

182. E.g., Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283, 1301–03 (2003).

amount of pain, suffering, difficulty, significant disappointment, distress, and significant loss that occur within the typical life,” harms that are imposed without consent only to bestow a pure benefit (existence).<sup>183</sup> If the argument requires us to accept this conclusion—that *all* procreation is actually wrongful—for most that will be a good reason to reject the argument.

Sensing the risk of a *reductio ad absurdum* here, Shiffrin considers (although she actually does not commit herself to) a weaker version of her claim that procreation wrongs another without being all-things-considered wrong, in that “[o]ne might believe that imposing overall beneficial conditions that nonetheless involve significant burdens is permissible, when the beneficiary is unable to consent, if one attempts to alleviate or partially shoulder the burdens one imposes”; that is, procreation standing alone is not wrong, instead what is wrong is “to procreate without undertaking a commitment to share or alleviate any burdens the future child endures.”<sup>184</sup> Shiffrin is not very explicit about what she has in mind in terms of an obligation to share or alleviate burdens: most of her discussion centers on legal support (in particular financial support), though some of her language suggests it goes further.<sup>185</sup>

With this move, though, Shiffrin’s approach threatens to prove *too little* to adequately justify the regulations of reproduction discussed in Part I. To the extent we assume *arguendo* that there are extra deficits that children experience in being born to and reared by LGBT parents or teenage parents, for example, it would seem as though those deficits are *already* being shared by those parents in rearing the child, such that we might say that these parents are already “paying for it.”<sup>186</sup> This

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183. Shiffrin, *supra* note 6, at 137–39. On Shiffrin’s view, the wrongfulness of the action is not defeated because the lack of prior consent was due to the fact that no one existed who could give consent—this is in part what leads her to discuss implied consent, which I analyze below. If one thought the non-existence of someone able to give consent was itself enough to create a wedge between the procreative case and Shiffrin’s Wealthy/Unlucky hypotheticals, then the case against her approach would be stronger still. In what follows, though, I put this problem to the side and show other problems with her argument.

184. *Id.* at 139.

185. *Id.* at 142–48.

186. Shiffrin herself seems to acknowledge something similar in suggesting that “[f]or those with relatively minor burdens (in contrast to those born in difficult circumstances or with significant disabilities), parental support and acknowledgement of responsibility may be all that is appropriate to expect,” and suggests as a prudential matter that she might limit tort liability only to cases where “people are hampered by extra burdens—for example, ever-

is particularly true as to the case of increased risks of genetic abnormalities resulting from incest, where the fact of a child's disability imposes many hardships on the lives of parents.

Shiffrin's argument might do better in condemning as wrongful the use of reproductive technologies by those over age fifty if the prospective parent is so old that we think she is likely to die before the age of majority of the child, thus failing to share in some of the burdens of the child. This objection to the aged prospective parent's behavior, however, might be overcome by the same means discussed for the externalities argument—by placing a bond to cover any support obligations up-front if she is unlikely to live long enough to give the child support to the age of maturity; something similar could be required for single parents. Indeed, in the case of the aged parent we might think trusts and estate provisions for the child already satisfy whatever bond requirement exists—although interestingly as a doctrinal matter in the United States, except in Louisiana, there is no requirement that an individual leave enough money to support their child through to maturity even in the run-of-the-mill case.<sup>187</sup>

A related concern with Shiffrin's approach is it not clear why it has to be *the progenitor* who him or herself bears the obligation of directly sharing the burden of the child rather than ensuring that someone else can do so. For example, assuming an older woman's spouse is younger and willing and able to take on support obligations should his wife predecease him, has the couple acted wrongfully in bringing the child into existence? Similarly, as to surrogacy or anonymous sperm donation, if the intending couple who will ultimately bear and rear the child can adequately provide for the child, why has the gestational or genetic parent not adequately negated the wrongfulness of her procreative act?

Shiffrin's position on this matter is not entirely clear but seems to augur against this form of substituted support. At one point she suggests that an anonymous sperm donor as "an integral, voluntary, participant in the creation process [should not] be able to avoid responsibility for the life he has created," and

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present significant pain, hindering disabilities, or life-threatening or shortening diseases." *Id.* at 141–42. However, as I noted, when she discusses anonymous sperm donation there are hints she may actually countenance a more expansive category. See *infra* note 188 and accompanying text.

187. See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 519–21 (8th ed. 2009). Even the Louisiana statute allows disinheriting children for just cause. LA. CIV. CODE ANN. art. 1621(A) (2008).

thus “should not be able to waive the rights of the *child* to support or damages *should that child be in need.*”<sup>188</sup> The last words suggest that in fact the duty of support only kicks in given the absence of another source of support, such that one might act wrongfully only if one brings the child into existence without someone else to support it. Later on, however, in discussing anonymous sperm donation and adoption more generally, Shiffrin suggests that to avoid wrongful actions parents must not only bear financial liability but also “moral accountability for the lives they create,” by which she means that “legal structures that permit biological parents, genetic donors, and gestational carriers to remain anonymous interfere with the child’s opportunity to consult one’s biological parents in adulthood,” and that those

who participated in the initiation of a life should . . . at the least, be accessible to the child, at some point, to participate in a justificatory dialogue about the child’s origins—that is, to discuss why the life was created, to relay familial history, and to listen to the child’s account of his difficulties and burdens.<sup>189</sup>

Once again, though, it is not clear why on Shiffrin’s view one could not negate the moral wrongfulness of procreation by finding a substitute to provide these things. For example, why would it not satisfy this duty if the parents of a donor-conceived child told the child that, “We, your rearing father and your genetic mother sought a sperm donor in order to bring you into the existence because we wanted a child to love who was genetically related to us and Daddy was infertile”? Why should knowledge about one’s family history be connected to obligations to support a child financially or emotionally, and why should either of those obligations be saddled exclusively on genetic parents when many others can be participants in bringing a child into existence?

There is a divergence between a version of the argument that is more relational—X harmed Y by creating her, therefore X (and not Z and not society as a whole) must be the one to make Y whole—versus one premised on the notion that it is wrong for X to create Y without making sure that Y will receive adequate support going forward. What is the wrongful act? Producing a child who is not provided for, or producing a child one ensures is provided for, where the parents who provide for it are not its genetic parents?

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188. Shiffrin, *supra* note 6, at 144–45 (emphasis added).

189. *Id.* at 145.

The former seems a much more defensible form of constraint than the latter to me, but what is important is that they would justify finding wrongful quite different kinds of reproductive activities. On the stronger relational type of argument, all forms of third-party assisted reproduction are all-things-considered wrong because one parent involved in creating the child does not provide support for the resulting child, whether or not the child is adequately supported. Indeed, as applied to gestational surrogacy this view might imply that the child is wronged even if *both* of its genetic parents provide support, because the gestational mother who participated in its creation did not provide any support—thus, the child is wronged for failure of *all three* parents creating it to support it, even though a child produced coitally would not be wronged if two of its creating parents supported it. This seems to undermine the plausibility of Shiffrin's claim. Perhaps more pointedly, Shiffrin's argument would lead us to conclude that all single parent reproduction (assisted or coital) is all-things-considered wrong and ought to give rise to a kind of tort liability in analogy to wrongful life. On the weaker thesis, by contrast, only forms of single parent and anonymous sperm donation (and possibly reproduction by older parents) might be wrongful, and then only if they fail to ensure adequate support for the resulting child. In any event, even on the stronger version of the thesis it is unclear why finding a substitute is not an adequate form of corrective.

One could push this idea much further: what counts as “adequate” support? If an over 50-year-old woman will be around until the child turns eighteen, but not longer, has she satisfied her duty of support, or does the support duty extend beyond its legal limits to the age of majority? Is the duty to support envisioned by Shiffrin one that depends on empirical findings on what kind of environments children flourish in—for example, suppose one accepted the (contested) literature on single parent reproduction showing children doing as well as those reared in two family households—or is it instead a hard-and-fast rule irrespective of such empirical findings? If the latter, is it problematically hetero-normative and traditionalist in that it requires two parents absent any showing of deficit? Shiffrin's discussions of these matters are fairly short, so it is unwise to expect determinate answers to these questions in her work. Just on its own terms, however, her approach cannot sustain most of the regulations of reproduction discussed in Part I because it seems either overinclusive (in condemning all pro-

creation), or underinclusive (in condemning only cases where children are truly without adequate support, which will be a minority of the cases, if any).

A separate more internal question for Shiffrin's argument is why parental support (financial and otherwise) has this wrong-mitigating effect? There is a way in which we can think of this kind of support as *additional* pure benefits added to the child to make the tally of harm to benefit more favorable, a kind of "boot" added to make up the weight of the harm, to borrow from income tax language.<sup>190</sup> But if that is so, it seems we have moved away from a strict constraint of "avoid doing harm to confer a pure benefit" to a rule that pushes for something like a more reasonable harm to benefit ratio. If the ratio of harm to pure benefit is what matters, though, then we would be forced to do a balancing of the harms of these kinds of lives as against an assessment of the benefits of existing—the exact thing the courts in the wrongful life context are loathe to do, and Shiffrin's approach seemed poised to avoid.

### C. THE INTUITION PUMP, THE ANALOGY TO PROCREATION, AND THE REJECTION OF HYPOTHETICAL CONSENT

The Wealthy/Unlucky case is Shiffrin's main intuition pump for her conclusion regarding the permissibility of doing unconsented to harm to confer a pure benefit, so it deserves close scrutiny.

As a threshold matter, I have to confess that I am quite unsure as to whether I think Wealthy *has* done something wrong to Unlucky on the hypothetical facts provided by Shiffrin, especially if (as Shiffrin is willing to concede in a footnote) I imagine that Wealthy acted with the best of beneficent intentions.<sup>191</sup> Perhaps my intuitive reaction to the case is aberrant, but if more widely shared it is an interesting contrary da-

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190. See I.R.C. § 1031 (2006). One response Shiffrin might offer is that at least some forms of support actually allow the avoidance/prevention of harm, not the conferral of pure benefit. That response seems inadequate, though, for it only mitigates a harm that was created by the act of procreation, and while one who mitigates some of the harm one has created does better than one who fails to do so, it is hard to see how this completely erases the wrongfulness of doing harm in the first place on Shiffrin's view. This may be why Shiffrin resists committing to the thesis that support can adequately negate the wrongfulness of procreation and the view that procreation is all-things-considered wrong holds some appeal to her.

191. See Shiffrin, *supra* note 6, at 128 n.28 (claiming Wealthy's intentions are irrelevant for her argument).

ta point. Indeed, if we take the courts' rejection of wrongful life liability as a reflection of intuitions counter to that assumed by Shiffrin, one might ask why it is the wrongful life intuition that ought be reformed and not Shiffrin's own intuition on Wealthy/Unlucky?

Putting that issue to one side, let us zone in on Wealthy/Unlucky. It is important for Shiffrin to find a hypothetical case that has four facts analogous to procreation<sup>192</sup>: (1) the act done only confers a pure benefit (rather than avoidance or prevention of harm), (2) the action was necessary (indeed the only way) to confer the benefit, (3) consent was impossible to get ahead of time, (4) and the individual is by her own concession better off for the act being done.<sup>193</sup>

Because of the artificial nature of the hypothetical, I worry that on at least two of these facts, notwithstanding Shiffrin's instruction to this effect, we are actually assuming the facts are exactly the opposite, and this may be what is triggering the intuition in the direction Shiffrin reports. We are told that Wealthy's method is the only way to confer the benefit and that consent was impossible to secure ahead of time, but everything we know about real life suggests the opposite: bullion could be dropped while individuals were asleep or shipped by boat, the island's news media could have been alerted to the drop.

Lest I be accused of committing the law student sin of fighting the hypothetical, let me clarify: I worry that the hypothetical is so artificially constructed that the intuitions it is generating among readers are actually a spillover from intuitions about the *real world* version of this fact pattern where getting prior consent and conferring benefit ahead of time are *not* impossible. This is not a criticism of Shiffrin *per se*, but of recourse to the intuition pump method in general (a method that I, like many philosophically inclined scholars, am fond of), and a reason to be cautious about how probative are the data it can provide. Our moral intuitions develop from real world

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192. At one point Shiffrin tells us the island's inhabitants are comfortably well-off but Wealthy just wants to make them richer, *id.* at 127–28, presumably to make it clear that this is conferral of a pure benefit not harm avoidance. It is not clear that this can map onto the procreation case, though. The children who are not yet born are not "comfortably well-off"; in fact, they are not anything, they just do not exist. It is possible that this distinction might also spoil the analogy and complicate it as an intuition pump for the procreative case.

193. *Id.*

events, and the more we are required to imagine facts that are in direct opposition to the real world, the greater my concern.

More substantially, I worry that Shiffrin's hypothetical has given us two pieces of information in tension with one another (if not in flat-out contradiction) that may further jumble our intuitions. The first is that Unlucky, whose arm is broken, "admits that all-things-considered, he is better off for receiving the \$5 million, despite the injury," but then in the next sentence notes that "[i]n some way he is glad that this happened to him, although he is unsure whether he would have consented to being subjected to the risk of a broken arm (and worse fates) if he had been asked in advance; he regards his conjectured *ex-ante* hesitation as reasonable."<sup>194</sup> In a footnote Shiffrin instructs us that some readers may "think it clear, even rationally mandated, that they would agree to a high risk or even the certainty of a broken arm for this payoff" but then instructs such readers to modify the hypothetical to one for which they would be uncertain about their prior consent such as a year-long coma or a gouged-out eye.<sup>195</sup> I find this puzzling. What would it mean to find a situation where I would admit I am all-things-considered better off but have doubts as to whether I would consent? Would not the refusal to consent in that action in such a situation actually be irrational? I worry that Shiffrin's discussion of doubts about consent is subtly undermining the premise that the individual is (including by her own self-assessment) all-things-considered better-off.

This tension is a real problem for two reasons. First, the requirement that the individual believes that he is all-things-considered better off is crucial to Shiffrin's argument in the reproduction case (though she is not explicit on this point) because without this stipulation we might worry that an individual has a life not worth living, an approach discussed above. If, in their individual assessment they are better off, they necessarily have lives that they believe are worth living. If so, her argument would merely demonstrate the already uncontroversial claim that it is wrong to bring people into being whose lives are not worth living—a view the Non-Identity Problem does not deny, and I have shown is unable to save much of the reproductive regulation of Part I.<sup>196</sup>

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194. *Id.*

195. *Id.* at 128 n.25.

196. Cohen, *supra* note 5, at 472–74.

Second, in the reproductive case and beyond, the consent stipulation Shiffrin gives is important because she goes to great length to refute an objection to her view based on hypothetical consent—that the divergence between intuitions on the rescuer case and Wealthy/Unlucky is that while we assume that everyone would consent in the rescuer case, we assume that is not true in the Wealthy/Unlucky case and (implicitly) that procreation looks more like the Wealthy/Unlucky hypothetical in this regard.<sup>197</sup> Shiffrin argues instead that generic hypothetical consent (not based on specific facts known about the victim and his preferences) is insufficient when harm is done to confer a pure benefit, especially when: “(1) if action is taken, the harms suffered may be very severe; (2) the imposed condition cannot be escaped without high costs; (3) the hypothetical consent procedure is not based on features of the individual who will bear the imposed condition.”<sup>198</sup> The problem is that many of her readers will think it very likely that they *would* consent to procreation of their parents notwithstanding the potential that life will contain the usual amount of miseries, set-backs, and the like.

Shiffrin has a response to this concern that “a *very high* percentage of people claim to be glad to have been born,” namely that “there are people who do regret being born and find the burdens of their lives too great” while “[o]thers are strongly ambivalent: [t]hey find their burdens are not entirely canceled out by the goodness of their lives and regard these burdens as ineliminable serious problems and intrusions” and “[a]lthough sometimes these reactions are unreasonable, it is hard to dismiss all these familiar, if unusual, reactions as wholly irrational.”<sup>199</sup>

The problem with this response is that Shiffrin is now creating an asymmetry between Wealthy/Unlucky and the procreation case. In the hypothetical she stipulated that Unlucky admits he was all-things-considered better-off for having the gold bullion dropped on his arm,<sup>200</sup> but now, in explaining why we ought not to be so sure of hypothetical consent in the reproductive context, she supports that claim by arguing that some individuals are *not* (by their self-assessments) better-off.<sup>201</sup> More formally, individuals are either (by their self-assessments) better off *or* they are not for the action having occurred. If individ-

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197. Shiffrin, *supra* note 6, at 131–33.

198. *Id.* at 133.

199. *Id.* at 133.

200. *Id.* at 128.

201. *Id.* at 133.

uals are better off if the action is taken and admit as much, *then* it appears they would in fact have consented, such that inferring hypothetical consent is not a problem and Shiffrin's argument has not overcome this objection and faces a problem; *if* instead they are truly not better-off for the action being taken and believe as much, *then* Shiffrin has only proven her point as to lives not worth living where we think individuals are really worse off for not having been brought into existence, and as I have discussed, none of the regulations of reproduction discussed above can plausibly fit in that category.

It is possible Shiffrin means for us to distinguish between whether an individual is actually made better-off (i.e., objectively) versus whether they assess themselves as having been made better-off (i.e., subjectively) before the event versus after; that is, that although Unlucky is both objectively and subjectively better off *ex post* he might have been subjectively unsure *ex ante*, a sort of bounded rationality or affective forecasting problem. However, if he is both subjectively and objectively better off for the act having been done, it is unclear why we ought to give dispositive weight to his *ex ante* hesitation in a situation where it is both impossible to ask for his consent and we cannot confer the benefit without acting. Moreover, when applied in the reproductive context, it is not clear what being subjectively unsure *ex ante* would mean. These children are not subjectively unsure *ex ante*, because they are not *anything* *ex ante*, they do not yet exist.

**Harm and Benefit:** A separate problem has to do with the nature of the harm in the hypothetical. By making the harm to Unlucky one of bodily integrity, it is possible that Shiffrin has tapped into a separate intuition about inviolability of the body, rather than a more general proposition of the wrongfulness of harming while overall benefiting. This would track doctrinal structures in tort treating bodily integrity violations as more serious than emotional distress ones.<sup>202</sup> Suppose instead of a broken arm Unlucky suffered great embarrassment or sadness but was overall benefited by five million dollars. Does the intuition remain that Wealthy acted wrongfully? If not, and we think the kinds of harms that result from procreation are more of the emotional distress type, the analogy between Wealthy/Unlucky and procreation may break down.

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202. See, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 489–510 (1998) (cataloguing and critiquing this tendency).

Shiffrin's conception of what constitutes "harm" in the procreation case might also be critiqued in a different way. Frances Kamm, for example, has rejected the idea that the things that give value to human life but which also cause pain, such as moral consciousness, could constitute being in a harmed state such that the normal acts of procreation could cause harm.<sup>203</sup> She worries "Shiffrin's argument would lead one to conclude that creating creatures incapable of moral choice, never in pain, and unaware of truths such as the prospect of death, like extremely happy, long-lived rabbits who have no other problems, would be preferable to creating human persons as they are now."<sup>204</sup>

Finally, on the benefit side, Shiffrin seems committed to the view that her Wealthy/Unlucky hypothetical should generate the same intuition no matter the amount of pure benefit involved.<sup>205</sup> But it may be that the hypothetical works (again, to the extent it actually pumps the intuition she claims it does) because of her choice of the *kind* and *amount* of benefit conferred. The benefit—monetary—seems to come from a sphere distinctly separate from the harm—bodily integrity—and thus trades on a separate-spheres argument.<sup>206</sup> If we altered that fact and altered the kind and amount of benefit, we may get a quite different intuition. To see this, keep the harm posed in Wealthy/Unlucky as the broken arm and transpose it into the procreative example: imagine that a parent reproduces knowing that their choice as to whether, when, or with whom to reproduce will result in a child with a broken arm at birth that can be fixed the same way it can in Wealthy/Unlucky. Even after reading Shiffrin's article, I think many would *not* have an intuitive reaction that this parent did something wrong. If so, that may stem from the fact that the benefit is at least partially in the same sphere as the harm (bodily life and health vs. a broken arm) and/or that the benefit is so much greater than the harm (life is a much greater benefit than five million dollars). If that is right, then Wealthy/Unlucky merely stands for a

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203. Kamm, *supra* note 7, at 1382–84.

204. *Id.* at 1384.

205. I say "seems" because early on in the paper Shiffrin briefly imagines a variant of the rescuer case where the arm is broken instead to provide benefits like "twenty IQ points worth of extra intellectual ability;" however, she argues for the act's wrongfulness not because it is a benefit from a separate sphere of the (physical) harm, but because it is a pure benefit. Shiffrin, *supra* note 6, at 127.

206. See, e.g., WALZER, *supra* note 130; Brock, *supra* note 130.

much more limited proposition and is not analogous to the procreative case.

#### D. CAN THIS VIEW SUPPORT CRIMINALIZATION OR BODILY INTEGRITY INTERVENTIONS?

Even if Shiffrin's theory can clear the hurdles discussed above, we face a separate question of whether it can ground criminalization or interventions that seek to invade bodily integrity such as sterilization (but from this point on I will just discuss criminalization).

It bears emphasizing again that Shiffrin herself does *not* argue that her approach can justify liberty-limiting restrictions like criminalizing reproductive conduct; she instead suggests that "one may agree that procreation is morally problematic without entertaining any notion of directly regulating it" pointing to "[f]amiliar arguments against state interference with rights of bodily autonomy and concerns about the terrific potential for state abuse" as "prevent[ing] consideration of such drastic measures."<sup>207</sup> Shiffrin instead endorses a weaker regulatory approach wherein those who engage in procreation "could reasonably bear some legal duties to compensate [the resulting child] or otherwise help to shoulder the costs of this imposition," which leads her to endorse a tort remedy similar to wrongful life suits although limited for prudential reasons only to the exceptional cases of "those born in difficult circumstances or with significant disabilities."<sup>208</sup> Thus, on Shiffrin's own view, the framework she proposes will not substitute for the BIRC justification because it does not support criminalization as a means of targeting reproductive decisions.

Of course, it may be that Shiffrin's *framework* but not her own writing could actually support criminalization as a means of influencing the target reproductive decision-making. To put the problem more generally, is it morally justified to criminalize activities that cause harm to but overall benefit an individual?

The substantive criminal law justification of choice of evils, which in the words of the Model Penal Code provides that the

[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged, . . .<sup>209</sup>

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207. Shiffrin, *supra* note 6, at 139.

208. *Id.* at 139–42.

209. MODEL PENAL CODE § 3.02(a) (1962).

represents a tempting analogy. That analogy would suggest that criminalization is inappropriate. Shiffrin's noncomparative approach to harm, however, suggests that this analogy would be precisely mistaken in that the justification targets doing harm to avoid a greater harm not doing harm to confer a pure benefit that makes the individual all-things-considered better off.

Again, it is very hard to find a real world case (apart from the procreative ones that are the subject of our inquiry) that could be used to test intuitions about criminalization. Recall that we need a case where (1) the act done only confers a pure benefit (rather than avoidance or prevention of harm), (2) the action was necessary (indeed the only way) to confer the benefit, (3) consent was impossible to get ahead of time, and (4) the individual is (including by her own subjective *ex post* self-assessment) better off. Therefore, perhaps returning to Shiffrin's Wealthy/Unlucky hypothetical—despite some of my misgivings about it above—will be more useful.

The question thus becomes, would it be desirable to criminalize the actions taken by Wealthy in Shiffrin's hypothetical?

Imagine for the moment that we are residents of the island on which Unlucky lives and where Wealthy has decided to drop gold bullion cubes. Ours is a small island with a legislature in which every citizen can vote, and a spy provides us with information on Wealthy's plans including his poor targeting and the risk that one of us may be Unlucky—although none of us knows who that might be and we are all at equal risk and we are without protective measures. One of our members then suggests that we pass a law criminalizing exactly Wealthy's behavior, which we will publicize to him via a sign on a hot air balloon announcing that if he attempts the action we will bring down his plane and imprison him. Behind a kind of veil of ignorance—not knowing who if anyone will have their arm broken and whether that (admittedly better-off *ex post*) person would if asked *ex post* also be unsure as to whether they would have consented *ex ante*—would you support passing such a law, assuming it will certainly have the desired effect of deterring Wealthy from acting?

Imagine that one member of the legislature instead argues:

Everyone agrees that even if one is Unlucky, the gold bullion cube clearly makes the one hit better off, and even if there are a very small number amongst us who are not sure *ex post* whether they would consent to have their arm broken for five million, the vast majority of us are sure we would consent. We can only prevent the harm (which in fact does not make that person worse off though he might not consent

to it) to this small minority by foregoing the pure benefit. I am not sure if I will be in the double minority of people whose arm is broken AND are ex post unsure whether I would have consented, but am willing to take that risk! Who is with me in opposing the criminalization?

Is it not likely that a majority of us would cast our vote against criminalization when presented with this argument? Again, one should be cautious about intuition pumps, but one thing I think my variation on Wealthy/Unlucky unpacks is a key difference between criminalization and tort recovery that is akin to Calabresi and Melamed's distinction between liability rules, property rules, and inalienability rules.<sup>210</sup> Inalienability rules provide entitlements an individual cannot voluntarily part with, while both property rules and liability rules confer on individuals an entitlement that they can consensually part with; property rules protect that entitlement by enabling courts to enjoin (or in the criminal context deter by sanction), while liability rules allow the violator to violate the entitlement but with the court setting a price after the fact for damages the violator must pay.<sup>211</sup> Shiffrin's approach is akin to a liability rule in that her approach to the wrongful life problem involves ex post compensation for the aggrieved Unlucky—if he asks for it, that individual is owed compensation for harm done to him that conferred on him (*and others*) a pure benefit. Thus, it may be possible to compensate him for the harm done (i.e., the broken arm) he did not and would not have consented to *without* adversely affecting the welfare of all others—the others being those who were benefited without being harmed (the many Luckys who receive gold bullion without injury) and those who are harmed but *would* have consented to it ahead of time if asked because of the overwhelming benefit. Indeed, if Wealthy would not drop gold bullion cubes (or would drop fewer cubes) knowing he will have to pay tort damages, it is likely that all these others in a Coaseian fashion would try to bribe Unlucky into taking the risk by parting with some of their gold bullion to allow the matter to go forward—and if Unlucky would accept the bribe, this again might suggest the problem is the amount of benefit.<sup>212</sup>

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210. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

211. See *id.*

212. This has interesting implications for Shiffrin's claim, in the procreation case, that her theory best explains why parents, not society at large, owe duties of support to children. See Shiffrin, *supra* note 6, at 140 & n.42. In fact,

By contrast, if the hypothetical legislature were to block Wealthy's activities outright through criminalization, Unlucky is protected, but at the expense of all of the other people who would rather the gold had been dropped. Thus, with criminalization individuals are forced to forego a pure benefit without harm (or a pure benefit for harm they would gladly consent to if asked *ex ante*) because there exists some minority who are harmed (but overall benefited) and are unsure if they would have consented *ex ante* even though they concede they are better off *ex post*. If this minority was a large enough share of the population, or if the pure benefit was small enough, we might vote for criminalization behind the veil after all. However, as to the procreation case Shiffrin is prepared to concede that "a *very high* percentage of people claim to be glad to have been born," with only a minority regretting their birth or being ambivalent about it.<sup>213</sup>

To be sure, it is a very strange exercise (if even possible) to imagine what a hypothetical legislature of not-yet-existing persons would vote as to the criminalization of reproduction. But if, as Shiffrin maintains, the Wealthy/Unlucky hypothetical is a good analogy to procreation and we can reason about this issue through that (somewhat more tangible) example, then it seems the same point should hold: even if harming while overall benefiting can justify a tort liability rule regime, it has a much harder time justifying outright criminalization of reproduction.

Therefore, I find that even putting aside other concerns with the Shiffrin-esque approach, it also runs into serious trouble justifying criminalizing reproductive conduct as the means of regulation.

What about non-criminal means of regulation? While I have suggested that for the Reproductive Externalities approach (among others) less liberty-limiting means of influencing the target reproductive decision—through the informational interventions of funding abstinence education, for example—are easier to justify, it is not clear that this is true on the Shiffrin-esque approach. If only a minority of individuals would *not* consent to the life they were given from being born to a teenage mother, while most treat the conferral of life onto them as a form of pure benefit akin to gold bullion for which they

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if we thought most individuals are both benefited by procreation and would have *ex ante* consented, perhaps *they* should be the ones who have an obligation to support the Unluckys of the world as a form of Coaseian bribery.

213. *Id.* at 133.

would gladly suffer broken arms in order to get, then discouraging early motherhood through abstinence education may be inappropriate for the same reason as criminalization. Indeed, any means of intervention that would have the effect of reducing the likelihood that an individual will procreate would have this effect; in other words, any effective means of influence will present this problem.<sup>214</sup>

Although inventive and brilliant, for these reasons I find Shiffrin's framework inadequate to do the work of BIRC and justify the regulations of reproduction discussed above.

#### IV. LEGAL MORALISM AND VIRTUE ETHICS

The Reproductive Externalities approach sidesteps the difficulties faced by BIRC by focusing on *harm* to already-existing individuals. The two approaches more briefly canvassed in this Part also focus on negative effects on others, but effects outside of the narrow confines of harm, at least as understood in Mill's Harm Principle.

The first approach openly embraces the preservation of traditional mores as a reason to limit reproduction, and Joel Feinberg has called this approach Legal Moralism in the narrow sense—the use of criminal law or other regulatory tools to deter acts which neither harm nor offend but undermine public morality, in order to preserve traditional mores.<sup>215</sup> The Legal Moralist approach remains a possible avenue for justification, but faces a few hurdles I discuss. I do not spend too much time on this approach, because this is a well-enough tread ground—most famously in the Hart-Devlin debates, and I have less to add.<sup>216</sup>

The second group of views can loosely be described as an application of Virtue Ethics—the view that concern with the virtue of the parents making these decisions justifies intervention. I concentrate on recent work by Michael Sandel and Rosalind McDougall in this tradition on enhancement and sex selection respectively. I show that many of the parental decisions at issue in the cases I have discussed are in fact conso-

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214. By contrast, Shiffrin's own preferred approach—tort compensation—seems potentially easier to justify, although for the reasons discussed in prior sub-sections, I am not sure why one should not conclude that the children in these cases are already adequately compensated, and even requiring tort compensation has the potential to deter procreative activities *ab initio*.

215. See FEINBERG, *supra* note 14, at 27; FEINBERG, *supra* note 165, at 3–4.

216. See, e.g., FEINBERG, *supra* note 165, at 15.

nant with their descriptions of parental virtue, and also show that a Parental Virtue Ethics approach may not escape the Non-Identity Problem after all.

#### A. LEGAL MORALISM

BIRC-type reasoning may mask a quite different kind of reasoning motivating the interventions set out above: Legal Moralism, broadly defined as the use of criminal law (or other means of influence) to deter acts that neither harm nor offend but undermine public morality. One excellent example of an attempt to uphold a law on Legal Moralist grounds is offered by Justice Scalia in his dissent in *Romer v. Evans*, the case that invalidated a Colorado constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexual persons from discrimination.<sup>217</sup> Justice Scalia chastises the majority for having “mistaken a Kulturkampf for a fit of spite,” and argues that “[t]he constitutional amendment before us here is not the manifestation of a ‘bare . . . desire to harm’ homosexuals . . . but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”<sup>218</sup>

A similar version is offered by Leon Kass in his essay on cloning (and reproductive technologies generally) in praise of “the wisdom of repugnance.”<sup>219</sup> “Repugnance,” he argues:

[R]evolts against the excesses of human willfulness, warning us not to transgress what is unspeakably profound. Indeed, in this age in which . . . our given human nature no longer commands respect, in which our bodies are regarded as mere instruments of our autonomous rational wills, repugnance may be the only voice left that speaks up to defend the central core of our humanity. Shallow are the souls that have forgotten how to shudder.<sup>220</sup>

Among other things, Kass laments how reproductive technologies such as cloning (but we might add other reproductive technologies) turn “procreation into manufacture,” and that such technologies where the manufacturer “stands above [the creation] . . . not as an equal but as a superior, transcending it by his will and creative prowess” are “profoundly dehumanizing, no matter how good the product.”<sup>221</sup> There are also ana-

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217. 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

218. *Id.* at 636.

219. See Kass, *supra* note 121, at 19.

220. *Id.*

221. *Id.* at 38–39.

logues in other authors' discussions of the sale of sperm, egg, and surrogacy services.<sup>222</sup>

A parallel justification here suggests that these regulations of reproduction are justified not to prevent harm to the resulting child or third parties as such, but instead to prevent society's slipping into moral degradation. Because the argument does not rely on harm to resulting children, it effectively sidesteps the Non-Identity Problem. For the same reason, however, unlike any of the other BIRC alternatives or reformulations, the approach is quite unconcerned with the question of the welfare of these resulting children—Legal Moralism can condemn acts of reproduction that produce very high welfare children, and champion those that produce children with very low welfare.

In a few of the examples discussed in Part I—the criminalization of brother-sister incest, prohibiting LGBT (and perhaps single individuals) from accessing reproductive technology—it seems quite plausible to me that Legal Moralism of this kind *actually lies* behind much of the legislative and scholarly support for these measures; that brother-sister incest is criminalized for the purpose of maintaining taboos that support the existing family structure, that denials of reproductive technology to LGBT individuals have as their real goal the penalization of or the expression of social opprobrium for what some might call a deviant lifestyle rather than the prevention of harm to children, etc. For other regulations of reproduction, the application of Legal Moralism may be less plausible as a motivation.

Legal Moralist justifications are avowedly illiberal in that they require subscription to particular comprehensive moral theories and thus take sides on what constitutes the good life. To say that a particular argument pretends to offer a liberal Millian Harm Principle justification when in fact it relies on an illiberal kind of Legal Moralism is not to say that the latter justification is necessarily insufficient as a basis for government regulation. That said, others (in much more complete and eloquent ways) have made the claim that Legal Moralism is an inappropriate basis for criminal law interventions, most famously

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222. E.g., Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 294–97 (1991) (expressing a fear that markets may alter our sensibilities in a way that leads us to “regard each other as objects with prices rather than as persons”); Cohen, *supra* note 43, at 691–92 (discussing the possibility of corruption, that markets in some goods may do violence or denigrate our views of how those goods are properly valued).

H. L. A Hart in his debate with Lord Devlin<sup>223</sup> and Joel Feinberg in his volume on Harmless Wrongdoing, which appears in his work on the Moral Limits of the Criminal Law.<sup>224</sup> This is one of the truly great debates in legal theory—whether Legal Moralism has any place in a liberal polity and, if not, whether we ought to embrace the liberal state—a debate to which some of the greatest legal and philosophical thinkers have contributed.<sup>225</sup> Given this intellectual firepower, I am modest enough to say I have little to add to this debate itself—one will either be convinced that Legal Moralism is an inappropriate basis for criminalizing conduct (and perhaps some other interventions) as I am,<sup>226</sup> or not, and anything I can say in this short space will not convince you otherwise.

Instead I see my contribution here as twofold. First, an unmasking one, to expose the potentially problematic bait and switch that is going on in much of the discourse about regulating reproductive technology, where Legal Moralist objections are clothed in the guise of a BIRC argument aimed at protecting society's most vulnerable. I suspect that many BIRC proponents of these measures consider themselves good liberals and if forced to instead rely on illiberal Legal Moralist arguments (due to the incoherence of BIRC ones), would no longer support the interventions discussed. Further, in some cases including LGBT access to reproductive technologies, the BIRC-type justification is sometimes offered *alongside* an illiberal Legal Moral-

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223. See PATRICK DEVLIN, *Morals and the Criminal Law*, in THE ENFORCEMENT OF MORALS 1 (1965); H. L. A. HART, LAW, LIBERTY AND MORALITY 60–61 (1963); see also COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1957) (debating the appropriateness of criminal sanctions for homosexual acts).

224. See FEINBERG, *supra* note 165, at 4–8.

225. For a glimpse of the great minds who have engaged this question, see MILL, *supra* note 13, at 9; JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 135–37 (R.J. White ed., Cambridge Univ. Press 1967) (1873); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 986–87 (1966); Robert P. George, *Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate*, 35 AM. J. JURIS. 15, 19 (1990); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 76 (1995). For a truly excellent recent history and historiography of this debate, see Harcourt, *supra* note 109, at 113–16.

226. Feinberg himself suggests that harmless immoralities might properly be targeted through subsidies or educational programs that promote a particular vision of the good life, so long as criminal prohibition is avoided. See FEINBERG, *supra* note 165, at 312–13.

ist condemnation of the lifestyle, but my analysis shows the BIRC strand adds nothing except obfuscation.

Second, from a U.S. constitutional law perspective, exposing what is styled as a BIRC justification as an illiberal form of Legal Moralism is important because of increasing indications that the latter is a constitutionally impermissible form of justification. In *Lawrence v. Texas*, the U.S. Supreme Court invalidated a statute criminalizing same-sex sodomy, and in doing so, the Court in large part relied on Justice Stevens' dissent from *Bowers v. Hardwick*, in particular his claim that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."<sup>227</sup> A number of authors have taken this as a rejection of the constitutional sufficiency of Legal Moralism as a justification for the criminalization of conduct.<sup>228</sup> If they are right, and the interventions discussed in Part I (and even then only a subset of them) can only be justified on Legal Moralist grounds, they appear to be constitutionally suspect. Of course, it is also possible that reports of the constitutional death of Legal Moralism are greatly exaggerated.<sup>229</sup>

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227. 539 U.S. 558, 577 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

228. E.g., Bernard E. Harcourt, *Foreword: You Are Entering a Gay and Lesbian Free Zone: On The Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503, 503–04 (2004) ("*Lawrence v. Texas*, will go down in history as a critical turning point in criminal law debates over the proper scope of the penal sanction. For the first time in the history of American criminal law, the United States Supreme Court has declared that a supermajoritarian moral belief does not necessarily provide a rational basis for criminalizing conventionally deviant conduct. The Court's ruling is the *coup de grâce* to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations."); see also Donald L. Beschle, *Lawrence Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously*, 53 DRAKE L. REV. 231, 262 (2005); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1106 (2004); Eric A. Johnson, *Habit and Discernment in Abortion Practice: The Partial-Birth Abortion Ban Act Of 2003 as Morals Legislation*, 36 RUTGERS L.J. 549, 604 (2005).

229. Indeed, Justice Kennedy (who authored *Lawrence* and would be a crucial vote in its extension) dissented in *Stenberg v. Carhart* a mere three years before *Lawrence*, regarding Nebraska's partial-birth abortion statute, and relied on Legal Moralistic ideas (or at least ideas very close to it) to justify criminalizing partial birth abortions but not others, suggesting his rejection of Legal Moralism may be fickle. See *Stenberg v. Carhart*, 530 U.S. 914, 963 (2000) (Kennedy, J., dissenting) ("D & X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect

As I have done several times throughout this Article, I here want to emphasize that not all of the means of influencing the target decision are equal. In particular, some of the means other than criminal law regulation may escape this constitutional problem. To wit, in *Harris v. McRae*, the U.S. Supreme Court upheld Congressional restrictions on abortion funding notwithstanding its rejection of the criminalization of those same abortions in *Roe v. Wade*, invoking arguments very close to Legal Moralism.<sup>230</sup> If *Harris* remains good law after *Lawrence*, as it appears to, then there is arguably room (as a constitutional matter) for Legal Moralism in the State's decision as to what to fund, one of the possible means for influencing the target decision already discussed. Thus, subject to a possible Equal Protection type challenge or a charge of pure animus,<sup>231</sup> Legal Moralism may permit the state to refuse to fund lesbian, gay, or single persons' use of reproductive technology (directly or through insurance mandates) while funding that of heterosexual married couples, even though it could not make the same distinctions through its criminal law. It is less certain whether Legal Moralism remains constitutionally alive and well as a justification for means of regulating reproduction falling between funding and criminalization—for example, whether one can punish a lifestyle through the regulation of parental status, or through tort law.

#### B. VIRTUE ETHICS

A different kind of response to the Non-Identity Problem is drawn from a broad Virtue Ethics tradition. This tradition suggests that an action is right if the action is one that a virtuous moral agent would characteristically perform under the circumstances.<sup>232</sup> In *The Case Against Perfection*, Michael J. Sandel offers a Virtue Ethics style argument against enhancement focusing on the parental virtues.<sup>233</sup> For Sandel, the problem with enhancement "lies in the hubris of the designing par-

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for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect.”).

230. See *Harris v. McRae*, 448 U.S. 297, 315 (1980).

231. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

232. See, e.g., Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 65–76 (2006); Rosalind Hursthouse, *Virtue Ethics*, THE STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta et al. eds., rev. July 18, 2007), <http://plato.stanford.edu/entries/ethics-virtue/>.

233. See MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 45–56 (2007).

ents, in their drive to master the mystery of birth . . . [because] it disfigures the relation between parent and child, and deprives the parent of the humility and enlarged human sympathies that an openness to the unbidden can cultivate.”<sup>234</sup>

Can the regulations of reproduction discussed above be defended along similar lines, as attempts to inculcate these parental virtues? The Non-Identity Problem poses no obstacle for an argument along the lines offered by Sandel. For him, like many in the Virtue Ethics camp, the character of the agent doing the action is what is central in determining its wrongfulness.<sup>235</sup> Thus, for Sandel, it appears that the practice of enhancement is wrong even if we grant that a given enhancement benefits the resulting child because the parents engaging in enhancement are acting in a way contrary to the parental virtues.<sup>236</sup> Because the Non-Identity Problem’s power stems from demonstrating the lack of harm to the child, it is powerless against this kind of argument, which does not depend on making a claim of harm to the child.

However, extending the argument into our context seems problematic: to the extent the problem with the forms of reproduction at issue here is that they are thought to produce deficits in the children that they produce (as against the hypothetical normal child), it is not *these parents* that evince an inappropriate lack of openness to the unbidden—they very much are willing to accept the child that results—rather it is *the State* that is evincing that attitude and seeks to interfere.<sup>237</sup>

That may just mean that Sandel’s brand of parental virtue is not a good fit for this context or must be supplemented with another conception. In offering her own Virtue Ethics approach to sex selection, Rosalind McDougall suggests that even if “[b]ecoming a parent is . . . partly and justifiably a self directed project,” the fact remains that “the primary purpose of a parent

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234. *Id.* at 46.

235. See Solum, *supra* note 232; Hursthouse, *supra* note 232.

236. See SANDEL, *supra* note 233, at 1–4, 11–19, 94–97 (emphasizing that his argument is distinct from arguments against enhancement relating to safety, autonomy, or distribution of benefits).

237. To be fair, the users of reproductive technologies as a whole are not easily characterized as a population more “open to the unbidden,” in that trait selection of sperm and egg donors as well as surrogates is rife in the industry. See e.g., *id.* at 1–4 (offering several compelling examples of trait selection of sperm and egg donors). My point, instead, is that the kinds of reproductive decisions targeted by the state, discussed above, cannot be easily condemned on Sandel’s approach because these parents do not evince these attitudes he finds inappropriate.

is the flourishing of his or her child,” and thus there “seems to be something unparental about an agent who creates a child with no chance of flourishing, purely to satisfy his or her own desire to have a child.”<sup>238</sup>

Might we say that the parents in our cases act “unparentally” by “creat[ing] a child with no chance of flourishing, purely to satisfy his or her own desire to have a child”?<sup>239</sup> Notice that the strong way McDougall puts her criteria, children with “no chance of flourishing,” seems to rule out many of our cases. Even if we assume *arguendo* that in our cases the resulting children—those raised by a single parent, a teenage mother, gay parents, not knowing one’s genetic father, etc.—have a lesser chance of flourishing, it is hard to say they have zero chance of flourishing.

The deeper question, though, is whether a Virtue Ethics approach centered on the child’s flourishing can really sidestep the Non-Identity Problem in the way McDougall suggests.<sup>240</sup> I would argue that it is just as apt a description of the parental virtue to say parents should try as hard as possible to prevent serious harm to (or confer benefits on) their children, while accepting the child they have—like Sandel, McDougall emphasizes acceptance “[b]ecause a child’s characteristics are unpredictable” and “[t]he flourishing of the child is facilitated by the parent’s embracing of the child regardless of his or her specific characteristics.”<sup>241</sup> The parents who would be subject to regulation in our cases (those who want to be single, gay, or teenage parents, etc.) are acting consonant with these virtues. They accept the children that this regulation would seek to prevent coming into being as they are, and the parents do not harm this child (or fail to confer benefit on it) for the exact reasons suggested by the Non-Identity Problem. While I have focused on the way the Non-Identity Problem renders harm to resulting child arguments problematic, it has a symmetrical effect on benefit to resulting child arguments. Put another way, it may be that any view tying the wrongfulness of reproductive action to the flourishing of the resulting child depends on some notion of harm and benefit to a child, which is rendered problematic by the Non-Identity Problem.

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238. R. McDougall, *Acting Unparentally: An Argument Against Sex Selection*, 31 J. MED. ETHICS 601, 603 (2005).

239. *Id.*

240. *Id.* at 602.

241. *Id.* at 603.

Even if I am wrong, and there is an account of parental virtue in which the types of regulation we have been discussing can be said to target unparental action, there are further difficulties. First, there is a general difficulty for Virtue Ethics. To the extent individuals propose clashing conceptions of parental only some of which render these acts of regulation problematic, how can we resolve these disagreements? Second, can this critique successfully form the basis of legal regulation rather than merely serve as a marker for moral wrongfulness? Virtue ethics is enjoying something of a renaissance in American legal circles.<sup>242</sup> In criminal law, specifically, a minority view has emerged that suggests that concern for the character of the perpetrator is a central aspect of criminal law,<sup>243</sup> and there are certainly categories of crimes (vice crimes such as gambling and prostitution, for example) where the focus on character seems still closer to the surface. Can the State use criminal law to encourage and inculcate virtue in the would-be perpetrator, even when the act that is criminalized is not at all harmful? That is a big question, and one I do not purport to resolve here, except to note that there may be concerns with marshalling criminal law interventions here even if we thought there was a good account of inappropriate parental virtues, and that Virtue Ethics was an appropriate moral theory to guide political decision making.<sup>244</sup>

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242. Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHIL. 178, 180–81 (2003) (reviewing articles applying Virtue Ethics to, inter alia, antitrust, civil rights, corporate, criminal, employment, and environmental law, as well as offering a Virtue Ethics take on judging).

243. See Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423–44 (1995); see also Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 364 (2004) (“In judging criminal conduct, virtue ethics judges the defendant’s exercise of practical judgment, and thereby his character.”).

244. Among the complications is that while the virtueless action may be harmless in our cases (due to Non-Identity Problem reasons), unless the character of the parent is reformed by deployment of the law, that same character may actually yield activities contrary to human flourishing in other contexts where harm *is* possible.

There is also an open question of whether a Virtue Ethics justification is constitutionally appropriate for criminal law interventions after *Lawrence*. Some passages in that opinion seem to inter only Legal Moralism, while others seem to reach further. Compare *Lawrence v. Texas*, 539 U.S. 558, 577–58 (2003), with *id.* at 571. As far as I know, there has been no discussion of this issue among Virtue Ethics legal scholars or constitutional ones. As I noted earlier, see sources cited *supra* note 161, if strict scrutiny applies, these regulations will also face separate over- and underinclusivity problems.

For these reasons, the Legal Moralist and Virtue Ethics approaches seems unpromising as justifications for the regulation of reproduction.

### CONCLUSION

In this Article, and in this larger project, I have shown a deep tendency for courts, legislatures, and scholars to appeal to a particular kind of justification for interventions that influence reproduction: the Best Interests of the Resulting Child (BIRC). As to interventions that aim at altering when, whether, and with whom we reproduce, I have shown that the Non-Identity Problem makes this form of justification problematic, an insight that courts have themselves recognized in the wrongful life category. Nevertheless, I have suggested that appeals to BIRC reasoning remain pervasive both because of an unthinking transposition of an idea from family law, and because of the political theory advantages of adopting a Millian Harm Principle approach focused on vulnerable populations.

I have also considered several other substitute forms of justification that could potentially do the work of the BIRC argument: Reproductive Externalities, Wronging while Overall Benefiting, Legal Moralism, and Virtue Ethics. For each, I have suggested reasons why these approaches are unappealing as criteria for moral wrongfulness and also expressed some skepticism as to their suitability as justifications for legal intervention, especially interventions that restrict liberty in serious ways, such as criminalization. These facts, I believe, also partially account for the persistence of the BIRC argument in the examples I have canvassed despite its rejection as to wrongful life liability: it allows us to avoid confrontation with these unpleasant implications.

Where does this leave the regulation of reproduction? Of the approaches I have outlined in this Article the Reproductive Externalities approach seems to me the most plausible way forward, though it may only be the best of a bad lot. Intriguingly, especially among bioethicists, it is the justification for regulating reproduction most seldom defended. My accounts of its infirmities (limitations to same-number cases, internalizing the externality, attenuation of harms, etc) and disturbing implications (eugenics, enhancement) may explain why this is the case. If we were forced openly to talk about Reproductive Externalities rather than BIRC, I think we would settle on a much smaller swath of such regulation. In particular, we would

regulate only in cases where same-number substitutions were likely, when externalities were net negative, when the net negative externalities were large, when we could not plausibly derive a scheme by which individuals internalize their externalities, and when the means of influencing the target reproductive decision are less liberty-limiting. As discussed above, I think only the regulation of adult brother-sister incest and abstinence education funding are plausible candidates for regulation based on this framework, and even then I have my doubts.

This is a tentative assessment. My goal in this project has not been to offer fine-grained assessments of particular reproductive regulations; instead, I have aimed to fundamentally rewrite the way we talk and think about regulating reproduction. I hope that never again will policymakers, courts, and legislatures defend the regulation of reproduction on grounds of children's best interest or child welfare, and instead recognize the complex and unpleasant questions that locution camouflages. While I have focused on a few particular regulations of reproduction, the lessons from this Article and the greater project are also applicable to a much greater swath of reproductive activity, including cloning, chimeras, and other technologies still further on the horizon.